



FEDERALISM AND INTERNAL CONFLICTS

SERIES EDITORS: SOEREN KEIL · EVA MARIA BELSER

Federalism, Devolution and Cleavages in Africa

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Federalism and Internal Conflicts

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INTRODUCTION

With the ongoing political crisis in Ethiopia, Sudan and the horrifying news that we hear and read daily, it is near to impossible to focus and conduct academic research on governance in Africa. At the same time however, the political ills of the respective countries, irresponsible use of power, tension between center and periphery and the suffering of the people do not help one sit idle and contemplate. It forces one to do a soul searching exercise in search of possible explanations and way outs.

The literature on divided societies and politically mobilized cleavages, theories on ethnic conflict, ethno national mobilization and how to manage them remain relevant to our context. Within in the discourse on federalism, the legal-cum-institutional approach has been dominant but had serious flaws. It does not explain the forces: social and political that necessitates federalism and devolution. This led to the theory of ‘federal society’ that proposes congruence between territorially based cleavages and institutions. Yet this approach as well remained far from complete as there is no automatic link between territorially based cleavages and institutional design. Social diversity could remain as an anthropological fact without having any political relevance. Political mobilization around identity as opposed to other forms of mobilization such as class for self-rule need agency (political parties and elites articulating mass grievances), theory (relative deprivation and the human needs theory) explaining the root causes for mobilization) and state response (or the lack there

of) that transform social diversity to identity based political mobilization that *impacts* institutional design. This specific political and social context impacts the nature and type of democracy and federalism. Territory making and unmaking and design of institutions, whatever form it takes, is not a neutral process and remain deeply contested issue because of rival perspectives one led by the state and the other by ethno national and regional groups that deconstruct the state led project of state and nation building at times leading to clash of nationalisms.

Since the emergence of the challenges against the centralized nation state both in the developed and developing world in the 1960s, there is a rich literature providing alternative systems of governance. It is unfortunate mainstream institutions and media in Ethiopia, Sudan and many parts of Africa have little grasp of these rich literature. South Africa's constitution making seems better informed about the debates. Divided societies exist across different parts of the world. It is not peculiar to Ethiopia, Nigeria or the Sudan. We find politically mobilized ethno national and regional groups in tension with those who hold power at the center in different parts of the world. Those who hold power, resources and media have their own version of nation building: state led nation building. As we know it, the nation state in a context of deep divides has been a mask for centuries promoting the interests and values of the *titular nation* at the helm of power. The state led nationalism conducted by the titular nation in the name of nation building, unity and territorial integrity has caused immense suffering to ethno national and regional groups at times amounting to ethnic cleansing and genocide. Tigray and Biafra are examples but similar challenges exist in other countries of Africa albeit to a lesser degree. Some question whether such a state deserves to be maintained as the costs for doing so are becoming too high. It has become the main source of insecurity and terror, contrary to its defining feature of providing security to its citizens. Those that contest the state led nation building have their own version of sub state nationalism. Within the context of the Horn of Africa (Ethiopia and the Sudan in particular), the clash between state led nationalism and ethno national and regional based nationalism has led to countless devastating wars and the making and un making of boundaries. Ethiopia lost Eritrea. Sudan lost South Sudan. Somalia lost Somaliland and remained a failed state. Whether Ethiopia will further lose other territories or even other regional states will remain to be seen but the signs and risks are certainly there, more than any time before. Sudan's ongoing war, itself result of years of tensions and

contradictions between the center and periphery is also bringing its own challenges not only for Sudan but also for the region. Yet, we should note that the clash between state led and ethno national or regionally based nationalism is not automatic. Clash and conflict is a deliberate choice made by elites and actors. In other words, short of conflicts, civil wars and fragmentation, there are many sane institutional and policy options that help manage the contestation between the two nationalisms. This book explores the different institutional and policy options available to manage such conflicting interests. There is already a rich comparative literature and political actors can chose one or combinations from the menu of options depending on the particular context. Several international, regional and Ethiopia based academic seminars and publications over the last two decades have explored the different options. There is a lot to learn from these rich experiences and adapt them to the respective contexts. Public law and political institutions are very much context specific but that does not mean there is lack of relevant experience that can address the ongoing challenges. If there is time tested solution elsewhere, why suffer from a well-known political disease? Only a fool would refuse to learn from a relevant experience in another jurisdiction.

The approach adopted throughout the book is both comparative and analytical. It looks into the nature of the cleavages and level of political mobilization, analyses the respective constitutions, institutions, the political dynamics and more than anything else provides explanation to the gap between design and lived reality. This book aims to define and diagnose one of the hegemonic frameworks of the 19th and 20th centuries: the nation state. Its evolution, normative assumptions and its pitfalls are discussed in chapter one. Without understanding the ills of the nation state particularly when confronted by politically mobilized cleavages, it is unlikely to find way out to Ethiopia's age old political crisis and other divided countries covered in this book. As the saying goes, understanding the problem is like having half of the answer. There is already a rich comparative literature that aims to address the ills of the nation state. The menu is very rich. Several western and African countries have over the last three decades attempted to introduce devolution, federalism and power sharing. Many European countries have since the 1970s used these institutional arrangements to address demands from different types of cleavages. There is a literature on nation building and comparative federalism but these two concepts are treated as distinct fields, as if there is no link between them. Indeed this is an important missing link that this

book aims to address laying the foundation in the first chapter but with more nuances in chapter four. By doing so the book creates a bridge between the two concepts and analyses how federalism and devolution could be used for *polity building* in diverse societies. Polity building is all about designing an inclusive political, economic and public policy system. Federalism and devolution are ideally about designing a more inclusive political and economic system. There is thus strong link between polity building and federalism or devolution. This is one major area not well explored within the African context.

It is also comprehensive treatment of the four major federal and devolved systems in Africa (also the Sudan that has been oscillating between devolution and federalism at different times) explaining their origin, design, operation and assesses their performance. More importantly, the book explains *the distinct nature* of federal and devolved systems in the Global South. Federal and devolved systems in Africa cannot be understood in isolation from the nature of state power in the continent. The book explains how state power impacts the dynamics of federal and devolved systems. Despite differences in the nature of the cleavages, level of political mobilization and institutional design among the countries covered in this book, one finds similar result: they all have centralizing features. This is a puzzle. Those mentioned differences were supposed to result in different outcomes. The explanation comes from the nature of state power in Africa that remains far from regulated and that impacts federalism and devolution in many respects. Whatever institutional designs we put in place, hegemonic political party, big men, business elite, army, remain the main actors that operate the political machine behind the formal constitutional arrangements. This is in sharp contrast to federal and devolved systems found in the west. Chapters two to four develop the theoretical frameworks used to analyze the designs, explore the different institutional approaches and assess how they have fared in reality while highlighting possible way outs.

The book links political mobilization and institutional design. Several international academic seminars have been held in the last couple of years that aim to address the nature of political cleavages. John Markakis and his colleagues have recently disclosed their major findings in the Horn concluding the nation state as ‘a wrong model’, although they do not provide the alternatives. The publication edited by George Anderson and Sujit Choudhry under the title ‘Territory and Power in Constitutional Transitions’ (Oxford, 2019) was very inspiring in taking that debate

steps further as it explores the reasons for mobilization and the institutional responses. The works of Will Kymlicka, Arend Lijphart and Donald Horowitz continue to guide institutional designers and in outlining the alternatives. Several other publications on divided societies that explain their nature and suggest ways to manage them were very helpful in setting the direction of the research. Ethiopians are yet in the dark even after years of civil war and conflict on how to deal with the political crisis in the country. A glimpse to the main stream media and the newspapers in Addis shows the lack of familiarity the country is in with respect to the major causes of state crisis and the war that is consuming the lives of young men and women and the entire economy. Ethiopia is deeply divided country and needs a different institutional set up that matches the level and gravity of the problem. Institutions are not designed in the abstract. They are supposed to reflect the aspirations of the society they are meant to govern. Yet, it is not one dimensional effect. Society also impacts the institutions. It is a dynamic process and that is how political and institutional reform comes to the scene. As the late Daniel Elazar has said, federalism is a continuous seminar in governance. It has to emerge, learn from practice, evolve and adapt across time. But more important is the political will and commitment to implement the federation, the exercise of power within the limits of the law and constitutionalism. The gap between promise and actual reality is causing frustration and conflict.

In terms of design, the debate between integrationist vs. accommodation both in theory and practice take center stage in the menu of options. The key however is to understand the nature of the political cleavage and its level of mobilization. Federal and devolved systems with less mobilized cleavages could resort to integration although some element of accommodation would ideally be relevant. Thus that are deeply divided will have to resort to accommodation yet again some element of integration may serve as complementary scheme. Federations that aim to empower ethno national groups cannot avoid the risks associated with intra unit minorities and issues of social cohesion. This has become acute problem in Ethiopia both because of institutional design issues and lack of political will to address these major emerging issues. A previous work on intra unit minorities aims to highlight the nature and gravity of the issue and

proposes ways to address it.¹ The relationship between federalism and democracy is rarely explored both in the comparative literature and in the Ethiopian context. In deeply divided countries such as Ethiopia, the type of democracy is also a contested matter and the book demonstrates the limitations of majoritarian democracy and shows better alternatives.

One of the basic concerns with the federal system in Ethiopia is whether actors at different levels are determined to implement it and what happens when political actors fail to comply with it? There is already rich literature indicating the link between federalism and constitutionalism. Federalism and devolution are rule based. All federal constitutions define the powers of the levels and branches of governments. The constitutions also set limits on power. Yet this is not enough. Federalism is a compact, a covenant between the federal government and states as well as the citizen. The pact and bargain needs serious institutional protection so that federal and regional state actors remain within the limits of their power. The political institutional arrangement takes the form of inter-governmental relations. Previous works have highlighted more on this. But one has to emphasize that it is the alternative to violence. Disputes over power and political differences are supposed to be settled through bargain, negotiation and compromises. Federalism is continuous bargain between the different levels of governments. Yet the political bargain may not work and parties may have to resort to an independent institution and this institutional guarantee comes from the guardian of the constitution. There must be an institution that impartially and autonomously enforces the supreme law when violated by either level of government. Chapter six (constitutional adjudication and governance) discusses in detail the conceptual and empirical issues related to constitutional dispute resolution. The discussion shows it is unlikely for federalism to thrive unless power (be it federal or regional state) is regulated, institutionalized and subject to constitutionalism and the rule of law. There is little that federalism and devolution could do in the absence of constitutionalism and the rule of law.

The idea of federalism as compact implies that the compact *binds* the parties to the negotiated deal: the federal government, the states and the citizen. It ensures the parties autonomy. In this sense federalism

¹ Assefa Fiseha Fiseha, 'Intra-Unit Minorities in the Context of Ethno-National Federation in Ethiopia,' *Utrecht Law Review*, (2017) 13(1):170–189. <http://doi.org/10.18352/ulr.402>

requires adherence to particular *ethos*. The respect and commitment to the federal pact as enshrined in the negotiated constitutional arrangement, faithful compliance and enforcement of the pact and equally important protection against unilateral encroachment. In this sense the compact is constitutional and institutional deal but beyond that it is also a *norm* for non-centralized governance. It limits the boundaries for the exercise of power and hence is interlinked with the notions of constitutionalism.

As argued in chapter one about the nature of state power in Africa and in chapter four about federal and devolved systems in Africa, federalism as compact and the idea of big man, hegemonic one party and centralizing features (imperial center) are strange anomalies and it is not difficult to trace the problems associated with federal and devolved systems in Africa. The ethos of autonomy of component parts, the essence of partnership between the levels of government, the idea of negotiated political settlement (as opposed to use of violence and coercion) and the lack of sanctions to unilateral violation of the pact are the main concerns many African federal and devolved systems continue to face. Federalism as compact has no one center, it is a matrix of multiple centers of power while in Africa there is often one imperial center (chapter four). There is some progress in Kenya, South Africa in this respect but Ethiopia's case show a federation without constitutionalism. The ongoing wars between the federal government and regional states, countless emergencies or the horizontal tensions also show regime's frequent resort to violence. *There is no federalism in violence*. Federalism with its focus on partnership and intergovernmental bargains as way to managing the political issues was meant to be alternative to violence. Ethiopia's case shows the death of political institutions and the living contradictory narratives prevalent in the country both in the past and the present. Federalism has been betrayed both in the past and more so in the present.

Final note that explains the distinct nature of federal and devolved systems in Africa is the relevance of functioning state institutions (state building). Many countries in the west had already well-functioning state institutions before they were federalized or have built them alongside the process of federalization. This is assumed in the west and discussion on federalism or devolution has no link with state building. The nature of state power in Africa comes here again as such institutions are either destroyed as a result of war (for example South Sudan and Somalia) or remain instruments of repressive neo-patrimonial regimes unable to deliver basic services. Without having those institutions or without fixing

the issues in state building, there is little that federalism and devolution could do. Indeed, one is forced to argue functioning state institutions are important preconditions for the success of federalism and devolution in Africa. What is federalism and devolution supposed to do in Somalia and South Sudan in the absence of functioning state institutions? State building has to go hand in hand with the process of federalization and devolution.



CHAPTER 1

The Nation State: Features, Its Pitfalls and Cleavages

This chapter explores key and contested concepts such as nation building, state building and the nation state in the context of deeply divided societies. It is partly a deconstruction of the nation state, or at least the nation state has to be problematized because the single nation assumed to exist in the nation state is an anomaly when confronted by rival ethno national and regional groups that assert self-government and recognition, common issue in deeply divided societies. Yet before it is deconstructed it has to be explained.

In societies that are deeply divided like Ethiopia, it is critical to understand the nation and nation building and explain how they are used or misused in the discourse. Their normative assumptions are also contested and since the 1960's alternative theories and concepts have been on the rise. Part one discusses the concept of nation building and how it is understood across time while part two explores the nation state, its origins, normative assumptions and its limitations. This chapter provides the framework for polity building for the case studies covered in the book and connects the different chapters. There is a rich separate literature on nation building and comparative federalism but these two concepts are treated as distinct fields as if there is no link between them. Indeed this is an important missing link that this chapter aims to address laying the foundation here but with more details in other chapters. This chapter

creates a bridge between the two concepts and analyses how federalism and devolution could be used for polity building in diverse societies. Polity building is all about nesting different identities by nurturing shared values and as will be shown later this is best done by designing an inclusive political, economic and public policy system. Federalism and devolution are ideally about designing a more inclusive political and economic system. There is thus strong link between polity building and federalism or devolution. If properly designed and implemented, federalism and devolution could be deployed for successful polity building in divided societies and conflicts could be minimized or prevented. More importantly, this chapter lays the explanation for the distinct nature of federal and devolved systems in the Global South. Federal and devolved systems in Africa cannot be understood in isolation from the nature of state power in the continent. The nature of state power impacts federal and devolved systems in Africa in many ways than one. The big man and hegemonic party system make institution building, division of power (hall mark of federations), sub state autonomy and constitutionalism difficult, if not meaning less.

1.1 NATION BUILDING OR NATION DESTROYING?

Nation building is one of the least understood, most confusing and abused concepts in the literature. There is little clarity on what it means and authors continue to use it to mean different things. Some experts use it interchangeably with state building.¹ The two concepts are related but are not one and the same. State building as outlined by Weber refers to a state that has a monopoly over the legitimate use of force and that is able to deliver basic services such as security and crucial public goods.² It is about building tangible and functioning state institutions. This is normally assumed to exist in the west but in many developing countries within the African continent, it is one of the daunting tasks as the institutions continue to suffer under hegemonic one party system and big men. In most cases the institutions also serve factional interests. Building functioning state institutions that are able to deliver basic services is on its

¹ Francis Fukuyama, *Nation Building Beyond Afghanistan and Iraq* (Johns Hopkins: Johns Hopkins University Press 2006): 3.

² Max Weber, *Essays in Sociology* (London: Routledge, 1957); see also Daron Acemoglu and James A. Robinson, *Why Nations Fail* (New York: Crown Publisher, 2013).

own a significant progress but is not enough. The legitimacy of the institutions and how they are perceived by citizens remains critical. Nation building refers to socio-political cohesion and the legitimacy of the institutions (more in later sections)³; it is intangible *software* that we invest on the people to build nested and shared belongingness to the polity shared cutting across divides. The distinction is important because when one writes about state failure, it is beyond the failure of state institutions.⁴ It also implies that there is crisis of legitimacy and the social contract needs to be revisited because it is broken, betrayed or is not enough. Most countries are inhabited by diverse societies and tension often exists between national identity projected by the state and ethno national, regional, religious identities pursued by sub state entities. The center may pursue for national integration while sub units may push for accommodation and pluralism objecting integration and the identity crafted by the state. Thus integration and disintegration may happen at the same time unless one balances the divergent forces.⁵ Nation building is thus a complex process that states and leaders invest on the people to ensure socio-political cohesion by crafting right ideology, designing appropriate institutions that address the legitimacy issue and promoting shared values that cut across the different divides. It is not a top-down process but a collective effort at constructing common destiny built on shared and inclusive values.

Over the last three decades several states collapsed including Somalia, Yemen, Iraq, Libya and Afghanistan. The international community invested a lot of resources and expertise to restore 'law and order' in these countries and most of it was done in the name of 'nation building.'⁶ Yet, a careful reading to this approach does show that the effort is related to building state institutions to be able to ensure security and provide basic services. It is also more about democratization and the conduct of elections than nation building. Besides, the efforts were largely conducted in western or other capitals detached from the very society meant to benefit

³ For an insightful distinction between state and nation building see Nicolas Lemay-Hebert, 'State Building without Nation Building? Legitimacy, State Failure and the Limits of the Institutional Approach,' *Journal of Intervention and State Building* 3:1 (2009): 22.

⁴ Ibid.: 23.

⁵ Goran Hyden, *African Politics in Comparative Perspective*, 2nd edn (Cambridge: Cambridge University Press, 2013): 54.

⁶ Fukuyama (n 1).

from the process. In the case of South Sudan both during the Comprehensive Peace Agreement (2005–2011) and after independence, the focus was on peace and state building. With the exception of post Second World War nation building project in Japan and Germany by the allied forces, it is rare to find a successful state and nation building imposed from outside by a third party. Iraq was supposed to be a show case for democracy in the Middle East before it faltered. The tragedy in Afghanistan and Libya is well known. The success in Japan and Germany was possible because both countries already had competent and *functioning state institutions* well before their destruction. Both countries had also the *core nation*, missing in many deeply divided societies. In addition to the US's unchallenged authority, absent in the fragmented societies of Afghanistan or Iraq, the necessary human skill was already in place when the allied forces began the reconstruction.

In the past nation building was used to mean the conscious creation of homogenous society out of many diverse societies often through coercion and assimilation.⁷ The governing *core group* ('the nation') designs and pursues policies over the non-core group(s) constructing and promoting a particular narrative over any other. That becomes the sole and single public identity to which the non-core groups are required to assimilate or integrate. The goal, although it remained contested, was to ensure *integration* and individual's *loyalty* to the nation. This is how the concept of nation building was used between the nineteenth and the first half of the twentieth century until it was challenged by the human rights revolution and minority rights discourse in the 1960s.⁸ The tools and instruments used vary but included assimilation (A plus B equals A or B, one group disappearing), fusion (A plus B equals C- an attempt to forge a new identity as in Swahili in some East African countries), partition (as in India and Pakistan), segregation (South Africa and USA in

⁷ The most classic work that advocated and predicted that minorities will assimilate and wither away with modernization and economic growth is Karl Deutsch, *Nationalism and Social Communication: An Inquiry into the Foundations of Nationalism* (Cambridge, MA: MIT Press, 1953). See also Harris Mylonas, *The Politics of Nation Building: Making Co-nationals, Refugees and Minorities* (Cambridge: Cambridge University Press, 2012).

⁸ Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford University Press, 2007); John Loughlin, 'Reconfiguring the Nation State: Hybridity vs. Uniformity,' in John Loughlin, John Kincaid, and Wilfried Swenden eds., *Routledge Handbook on Regionalism and Federalism* (London: Routledge, 2013): 7–8.

the past), pan Africanism, pan Arabism, patriotism and in the worst cases ethnic cleansing and genocide.⁹ Homogenizing the culture and language of the subjects to the core nation by promoting the language, culture, religion of the chosen nation and standardization of education constituted core part of the nation building project. In an award winning publication Crawford Young (1976) and recently Will Kymlicka (2007) have attacked this model and since then new approaches to nation building have been introduced.¹⁰ Wimmer wrote political equality between ethnic groups is a key defining element of nation building. Oppressing or even physically harming minorities' shows that a nation-building project has failed.¹¹ As rightly argued by Connor assimilation and marginalization of ethno national minority is not nation building but nation destroying.¹²

As part of his relational and exchange theory, Wimmer defines nation building as 'extending networks of political and other forms of alliances, whatever their nature, across a territory between the state and society and *forge* political ties between citizen and state that reach across *ethnic divides* and *integrate* ethnic majorities and minorities in an *inclusive power arrangement* to imagine and then realize that they are nested together as a political community and feel *loyal* to co-nationals, above and *beyond* their attachment to an ethnic group, a tribe, a village community, or a religion.'¹³ He further wrote nation building entails national identification: citizens begin to see themselves as members of a 'national' community. Following the French Revolution, the nation determines and identifies itself with the state, the state is the creation of the nation and identification with it is assumed, not contested.¹⁴ The nation then has an identity and this very identity is what becomes contested as will be elaborated

⁹ See Walker Connor, 'Nation Building or Nation Destroying?' *World Politics* 24:3 (1972): 319–355.

¹⁰ Crawford Young, *The Politics of Cultural Pluralism* (Wisconsin: The University of Wisconsin Press, 1976); Kymlicka (n 8).

¹¹ Andreas Wimmer, *Nation Building: Why Some Countries Come Together While Others Fall Apart?* (Princeton: Princeton University Press, 2018): 6.

¹² Connor (n 9).

¹³ Wimmer (n 11): 23; see also Alfred Stepan, Juan Linz, and Yogendra Yadiv, *Crafting State Nations: India and Other Multinational Democracies* (Baltimore: Johns Hopkins Press, 2011) see also Rene Grotenhuis, *Nation Building as Necessary Effort in Fragile States* (Amsterdam: Amsterdam University Press, 2016): 30.

¹⁴ Grotenhuis (n 13): 20.

later. Ethno-national and regional forces challenge that very identity as belonging to the core nation only and not to all. As a result of colonialism, open immigration policy, globalization or other socio-political factors the core nation may continue to face new diversity but that does not make the nation state obsolete, it makes polity building more problematic.¹⁵ Two brief remarks here. Firstly, those who have written on nation building do rightly identify inclusion as key to the process of nation building but the 'how' issue is simply left as a side matter or is advocated to the limited transitional process of political settlement phase only. As will be shown in other chapters, the 'how' remains central to nation building and it is here where non-centralized forms of governance come into the picture.¹⁶ Institutional design issues come here in many forms. Inclusion is also problematized from the perspective of the citizen and civil society (in the old liberal sense) and misses group based politically mobilized cleavages, a major focus of Chapter 4. As indicated in the last section of this chapter, this is the most potent force challenging the nation state.

Secondly, while Wimmer's conception of nation building is an advanced one, it suffers from some limitations. Identification with the state is contested in divided societies as they could identify more with something else than the state. Nation building in the sense he adopted is a *deliberate* state act and policy invested on the people living in a country to build the sense of *shared and nested belongingness* as a political community to the polity, beyond and above their bond to other forms of attachments such as language, ethnicity, region, religion or other forms of diversity, through inclusive power sharing arrangement. With right and inclusive political ideology, and functioning state institutions, it ensures that centrifugal forces remain loyal to the overarching state despite their sub state national identity. One of the major limitations of Wimmer's concept of nation building is the fact that he refers to 'identification with national identity' when that concept in itself is part of the controversy. There may or may not be a 'national identity' in countries that are deeply divided. Possibly there are more than one national identities competing each other in the political space. He does not make a distinction between different categories of societies.

¹⁵ Ibid.: 30.

¹⁶ See Chapters 2–4 in particular.

While analyzing nationality in divided societies David Miller makes three useful classifications.¹⁷ Rajeev Bhargava also adopts similar notion to discuss India's complex diversity.¹⁸ A typical nation state, that is a political community bounded by single culture (be it ethnic or religious) with its defined territory and having its own state and government. Some of the west European nation states are classic examples. Recent developments in India under Modi show there is shift from India as multiethnic democracy to one based on militant Hindu nationalism which some regret as 'ethnic democracy' that turns Muslims and other minority groups to secondary class.¹⁹ Five decades of non-centralized and inclusive Indian multiethnic democracy is now being reshaped based on Hindu nationalism which is a tragic regression. Within the comparative federal studies, some federations are as well nation state federations under the control of one core nation as in USA, Germany, Austria and have no aim of granting autonomy to a territorially based identity.

The second one is coalescent nationalism or also called multiethnic countries where the constitution recognizes each separate culture and identity in the country and at times each federal sub unit is composed of distinct society yet each distinct society *sees itself as part of a larger* and overarching common identity. There may be one or more manifestations of local identity but such groups also happily identify themselves with the overarching state. Some countries are diverse but the diversity does not have any political meaning. As such it is not politically mobilized and no particular region, sub unit or political party pushes for territorial autonomy, self-government or secession.²⁰ There is no prior history of discrimination and thus ordinary citizens live as happy ones despite differences in language or religion identifying themselves with the overarching

¹⁷ David Miller, 'Nationality in Divided Societies,' in Alain Gagnon and James Tully eds., *Multinational Democracies* 304 (Cambridge: Cambridge University Press, 2001): 300–302.

¹⁸ Rajeev Bhargava, 'Should Indian Federalism Be Called Multinational?' in Michel Seymour and Alain-G. Gagnon eds., *Multinational Federalism: Problems and Prospects* (Palgrave: Macmillan 2012): 246–248.

¹⁹ Christophe Jaffrelot, *Modi's India: Hindu Nationalism and the Rise of Indian Democracy* (Westland Publications, 2021); see also Tarunabh Khaitan, 'Killing a Constitution by a Thousand Cuts,' *Law and Ethics of Human Rights* 14:1 (2020): 49–95.

²⁰ Alfred Stepan, 'Towards a New Comparative Politics of Federalism, Multinationalism and Democracy: Beyond Rikarian Federalism,' In Edward L. Gibson ed., *Federalism and Democracy in Latin America* (Baltimore: Johns Hopkins University Press, 2004).

state and its institutions. Creating a common sense of belongingness that prevails over sub state identity becomes not a difficult task.²¹ At times this may include countries with politically conscious diversity but is not as such politically mobilized for self-determination. In the literature this is sometimes called as multiethnic society and Switzerland with the Cantons cutting across linguistic and religious divides is mentioned as a classic example.²² As such the different identities are nested to one another.²³

The third category refers to countries that are not only diverse but the diversity is also *politically* mobilized. In the literature these are also referred as deeply divided societies, multi-nation societies, pluri national or countries with assertive and rival nationalism.²⁴ Within this last category, Liam Anderson makes a further useful distinction between ethnic federations and ethno-territorial federations. Ethnic federations are federations that explicitly provide *each* of the major ethno national groups with their homeland ensuring self-government and ethnicity is the defining feature of the system. It is also likely that as they often are inhabited by several rival groups, there is no one dominant core nation but several ethno national groups none of them constituting a majority. This raises chronic issues to both *democracy and federalism*. How does one establish a legitimate and inclusive central government in this context and how do we accommodate the different groups both in the center and subunit level becomes very complicated because of the absence of the *core nation*.

Ethno-territorial federations, on the other hand, combine both the ethno-national and the territorial features. 'Ethno-territorial federations are those in which one or more territorially concentrated ethnic groups are accommodated via the provision of a subunit homeland, but *the numerically dominant ethnic group* (the core nation) is carved up (cracked) among multiple subunits. Examples include Canada (the English speaking part is divided to nine provinces), Spain (Castilian Spanish exist in fourteen autonomous communities, and India (Hindi speaking population are divided into nine provinces). Ethno-territorial federations fuse the logic of territorial and ethnic federalism to produce systems that are structurally and functionally distinguishable from both.

²¹ Bhargava (n 18).

²² Miller (n 17); Stepan, Linz and Yadiv (n 13).

²³ Miller (n 17): 305.

²⁴ For details see Chapter 4.

In other words, they constitute a separate category of federal system.²⁵ Within these last sub classification one can also make a distinction between bi-communal federations such as Canada that are ethno-territorial in which the English speaking part is divided to several provinces while the French speaking part is found in one province and yet there is competition and rivalry between the two communities. There is a core nation (the English speaking part that is divided into several provinces) and an ethno national minority. Ronald Watts argues bi-communal federations pose a peculiar challenge compared to those ethno-territorial federations that are home to many diverse groups. In the latter, possibility for shifting alliances among groups on issues makes political deadlock less likely while in the former it is common challenge.²⁶ The above distinction is vital because the nature of the issues vary. In the ethno-territorial federations because of the existence of the core nation, it is only one of the members that is raising concerns. If we assume a family with many children, it is only one child in the family that feels mistreated and may think of staying in or has to leave. In the ethno national federation that has no core nation, it is the entire family: parents and all the children that are not feeling well and that need treatment.

While the link between such rival nationalism and institutional design is discussed in Chapter 4 in detail, suffice to mention here the fact that the kind of constitutional politics in the third category is different from the former two groups. In the last category a particular group or groups identify themselves with a particular nation that is different from the one projected by the state. Different identities are politically mobilized and often are found territorially based making *claims* for political autonomy, self-determination and possibly secession. Unlike normal constitutional politics that emerges in homogenous states, here the claim by the ethno national group is for self-government possibly with a sovereign state of its own. It is not simply a change of government within an existing state but change to the territorial and political system and assertion of state of one's own.²⁷ The constitution and the values that it claims to promote

²⁵ Liam Anderson, *Federal Solutions to Ethnic Problems: Accommodating Diversity* (London: Routledge, 2013): 7.

²⁶ Ronald Watts, *Comparing Federal Systems*, 3rd edn (Montreal and Kingston: McGill, Queen's University Press, 2008).

²⁷ Philip G. Roeder, *Where Nation-States Come From Institutional Change in the Age of Nationalism* (Princeton: Princeton University Press, 2007): 20–21.

are contested because it is perceived as promoting the *identity* of a single nation: constitutional identity is part of the debate. Self-determination is thus central and enduring element and as a result the existence of the state itself is questioned and if it should exist, the *terms* are debated. Political mistrust and rivalry between the different segments is integral to the political process: political power, the nature of democracy, institutional design, nature of political party, identity and public policy are often the areas of contestation. The 'segmental identities' seek to enhance their political and territorial autonomy, mobilize resources and institutions at their disposal against the center while the central government's focus is on the overarching identity, unity and territorial integrity that may lead to deadly conflict. In short, as a result of the rival nationalism one projected by the state and the other by segmental identities, the very existence of the state, its territory and symbols are often contested.²⁸

While in the two categories discussed above the nation and national integration concepts may make sense, in the third category, it is problematic. There is no one nation (*demos*) but many rival nations (*demoi*). The nature and type of political party configuration also differs. It is likely that there will be political parties whose sole purpose is articulating and defending the interests of the political community they claim to represent. A study shows that the birth of a new nation state from an existing multinational state is very high in particular if the ethno national minority had already existing sub unit institutions called 'segmental institutions.' Roeder wrote, 'From 1901 to 2000, 177 new states were created and 153 of them (86%) had been segmental states prior to independence.'²⁹ The logic is political institutions have significant effect in shaping and framing identities as they provide platform for national mobilization and political

²⁸ George Anderson, and Sujit Choudhry, 'Territorial Cleavages and Constitutional Transitions: Political Mobilization, Constitution Making Processes and Constitutional Design,' in Anderson and Choudhry eds., *Territory and Power in Constitutional Transitions* (Oxford: Oxford University Press, 2019): 374.

²⁹ Roeder (n 27): 18. The relationship between the segmental state and the overarching state is however complex and not straight forward. As in Canada and UK, it is possible to have a democratic overarching state that through an incremental political process accommodates demands from segmental identities that may in the process cause splits within the latter and moderation or an authoritarian overarching state as in former USSR, Yugoslavia and currently Ethiopia that reinforces radical movements in the segmental state leading to conflict and fragmentation. The nature of the segmental state elite has also impact the same way as the overarching state. See Roeder (n 27): 81–86.

ambitions for collective action and secession is as such an *upgrade* of the existing segmental institutions to a new nation state. If rival nationalism exists, there is possibility for will and ambition to have own state or at least self-government. The fact that segmental institutions exist provides *capacity and resources* to sub state elites to achieve what they plan to achieve. The opposite is also true. Society also shapes institutions and indeed it is the major claim of this chapter and Chapter 4 that cleavages have impact on the design of institutions. The making and unmaking of constituent unit boundaries and the principles and processes for doing so remains contested because it either aims to *frustrate* the ambition of segmental identity as it breaks a potential nation state into pieces (Nigeria, Kenya, South Africa) often rejected by the ethno national elites as part of divide and conquer or promises to empower the segmental identity (Ethiopia: the promise never implemented). As will be illustrated in Chapter 4, this reality shapes constitutional politics and has impact on constitutional design and can be managed before causing conflict and fragmentation.

Coming back to nation building, the question in the third category is how does one build a sense of shared and nested belongingness to the polity and instill it on the people so that they develop shared vision that prevails over other forms of loyalties: ethnic, region, religious or otherwise? There surely are competing nationalism: one led by the state called nation building and the other by the sub state group sometimes called ethno nationalism, minority right etc. leading to clash of two nationalisms unless carefully managed. Is it even possible to build a shared and nested political community above and beyond ethnic or religious identity in those cases? And can the project be rightly called 'nation building'? As will be outlined later in this chapter, there is no one nation but two or more nations in a state and each nation is perhaps in search of its own statehood as is the case in many countries (French speaking Canada, Flemish part of Belgium, Scotland and Northern Ireland of UK, Catalan of Spain and the countless national liberation fronts of Ethiopia). There are nations without a state. Thus when one refers to national identity, the question comes: which national identity? The one espoused by the state or by the ethno nationalist/segmental state? Because the project of nation building refers to both efforts: one led by the state and the other by the ethno nationalist often in reaction to repressive state policy and action. For purposes of avoiding such confusion, we have to find a more neutral concept that we can employ to the state led effort in constructing

the shared and nested belongingness to the overarching state. Polity building is a preferred concept in this respect. It is relational and part of exchange theory between the state and society and as will be demonstrated shortly, it has several elements: among others political integration, state and institution building and public policy.

Andreas Wimmer asks ‘why did some countries fall apart, often along ethnic fault lines, while others held together over decades and centuries, despite hosting a diverse population?’ in his fascinating book on nation building published in 2018.³⁰ One should add why do some countries deliver public goods better than others? These are two major and separate but very much interlinked issues: one deals with what Wimmer calls nation building (referred here as polity building) and the other on state building.³¹ State building refers to the building of institutions to enhance the ability of the state to deliver basic public goods such as security (army, police), services (bureaucracy) roads, education and health. It is about building tangible and visible institutions of the state that continue to serve society regardless of changes in political parties as a result of elections.³² State building is not the major focus of this chapter but is implied in several sections (delivery of public goods) and chapters, for example with respect to second chambers, minority rights and on constitutional adjudication.

Yet we should note that state building is an integral part of polity building. There are many experts that analyze polity building from different aspects. Some focus on the *onset* and the *process* while others on *outcome*.³³ Wimmer argues that polity building has several major

³⁰ Wimmer (n 11).

³¹ Two major works that explain why some states deliver better than others are Francis Fukuyama, *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy* (New York: Farrar, 2014); Acemoglu and Robinson (n 2).

³² Grotenhuis (n 13): 73.

³³ See for details Mylonas (n 7). Those that focus on onset like Anthony Smith argue that nation building is impossible without a *core nation*. O’leary also argued there must either be a core nation or alternatively an inclusive consociational political system. Anthony Smith, *Ethno-Symbolism and Nationalism: A Cultural Approach* (New York: Routledge, 2009); Brendan O’Leary, ‘An Iron Law of Nationalism and Federation? A Neo-Diceyan Theory of the Necessity of a Federal Staatsvolk, and of Consociational Rescue,’ *Nations and Nationalism* 7:3 (2001): 273. There are also those who focus on military and national

components and he analyses the components within the framework of exchange relationship between state and society while focusing on political inclusion.³⁴

1.2 INSTRUMENTS OF POLITY BUILDING

1.2.1 *Political Integration and Representation*

For purposes of this chapter, we classify the components of polity building into hardware and software of polity building. The terminology is carefully crafted to show the importance of both categories of instruments for polity building while conveying the message that the hardware is considered as *foundational* and the software as *catalyst*. In most cases they are not clearly stipulated as distinct concepts. Experts continue to ask why some people positively identify themselves with the state, its institutions and symbols while others do not or even identify more with their ethno national, regional or religious identity than with the overarching state. This is not an abstract and complex question although that is how many prefer to stipulate it.

A fundamental element of the social contract between the state and society that impacts the process of polity building is whether the political and economic system of the polity is inclusive or not. Studies on minority rights, ethnic conflicts and nation building have shown that *inclusive political systems and representation* of all sections of society in public institutions builds the sense of ‘we belong to the system’ mentality and the corollary of positive identification of citizens with the overarching state above and beyond allegiances to ethno national, regional or religious

services as well as mass education as a means to indoctrinate citizens about nation and nationalism. Others focus on process like industrialization, modernization and urbanization (Deutch, Gellner and Anderson) that facilitate acculturation and integration. Both the onset and process based nation building efforts did not succeed in societies with deep divisions and Wimmer’s approach to polity building on political inclusion that reaches out to all segments of society remains very powerful because it deals with the real issue, not the symptoms. Ernest Gellner, *Nation and Nationalism* (Oxford: Basil Blackwell, 1983); Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1983); Karl Deutsch, *Nationalism and Social Communication: An Inquiry into the Foundations of Nationality* (Cambridge, MA: MIT Press, 1953).

³⁴ Wimmer (n 11): 2, 28.

identity.³⁵ Wimmer as well reinforces this finding and argues identification with the overarching state and its institutions and *success* in polity building is related to political representation and inclusion. He wrote, it is a matter of ‘power and politics, rather than the demographic makeup of the population.’³⁶ This is fundamental because earlier studies have focused on the nature of society in the polity and whether it is heterogeneous or homogenous.³⁷ Depending on the nature of the cleavage and its level of mobilization states need to design appropriate institutions and policies to accommodate and manage their diversity. The idea of political inclusion and representation is primarily about creating a *just* political and economic order in a polity but it is also part of human psychology. Take print out of a group photo circulating among the group. There could be a few Marxist’s who may argue, I see the photo as an entity (to mean people first), yet every member of the group instinctively looks at his/her own photo first and then sees it as an entity. It is part of human nature to see our own images in public institutions, the same way we prefer to see our own picture in the group photo. Public institutions in diverse societies need to reflect the diversity on the ground following the logic of the group photo. It impacts the *legitimacy* of the institutions and more importantly their *performance*. It is unrealistic to expect a public institution that suffers from legitimacy crisis to deliver an effective service. So the inclusion and representation logic has direct relations with creating just political and economic order. It has also *symbolic* importance in addition to the core aim of creating a just political and economic order.³⁸ It is for this reason that political integration of society through inclusion

³⁵ Stepan, Linz and Yadiv (n 13). Sujit Choudhry, ‘Bridging Comparative Constitutional Law: Constitutional Design in Divided Societies,’ in Sujit Choudhry ed., *Constitutional Design in Divided Societies* (Oxford: Oxford University Press, 2008); Kymlicka (2007) (n 8); Lars-Erik Cederman, Andreas Wimmer, and Brian Min, ‘Why Do Ethnic Groups Rebel? New Data and Analysis,’ *World Politics* 62:1 (2010): 87; Acemoglu and Robinson (n 2): 429.

³⁶ Wimmer (n 11): 227, 217.

³⁷ Most American authors tend to think diversity is an obstacle to polity building while European experts tend to think otherwise. See the debate between integration vs. accommodation in Chapter 4 for details.

³⁸ For details on this see Karlo Basta, *The Symbolic State: Minority Recognition, Majority Backlash and Secession in Multinational Countries* (Montreal & Kingston: McGill-Queen’s University Press, 2021).

and representation particularly in diverse societies is considered as *foundation* for polity building: it is the hardware of polity building. Yet it is vital to note at this stage, the inclusion and representation issue should be genuinely addressed. As will be shown in later chapters, within the African context, central governments select *puppets* in the name of representation and inclusion and the puppets neither deliver nor genuinely represent they very society meant to be represented. Such systems are exposed to legitimacy crisis and in the end to violence. Ethiopia is a classic example but it is also a concern in many African countries.³⁹ In addition to the nature of state power in the continent (discussed later), lack of inclusion and representation has been a major concern throughout post-colonial Africa leading to wars, conflicts and at times secession.

Since the 1960s, nation building and the nation state have been put to test and alternative theories for polity building have been on the rise. Whether it is possible to ensure democracy, stability, peace and social cohesion in countries with deep societal divisions and the appropriate institutional arrangements is one of the central political issues of our time.⁴⁰ This is particularly so in many diverse countries in Africa where nation-building is linked with coercive and arbitrary processes by which the same communities are subdivided into different countries by artificial colonial borders.⁴¹

In some African countries with deep cleavages, the state continues to suffer from structural problems where the central government is often accused of centralisation of power under an imperial center (big man, hegemonic party), weak institutions, corruption, abuse of rights and marginalization of the bulk of society. By the end of 1980s, there was already solid study showing the African state is weak and in crisis and needs overhauling, leading to the *Third Wave*⁴² and other reforms such

³⁹ The author was presenting approaches to polity building in divided societies in the Summer Program of the Institute of Federalism, Fribourg Switzerland in August 2022 and when the issue of representation and problem of puppets came in, participants from Asia and Africa were unanimous in pointing how representation is misused in the gender and minority rights field. They said *puppetism* is everywhere an issue.

⁴⁰ Stepan, Linz and Yadiv (n 13). Choudhry (n 35): 4.

⁴¹ For the limitations of the nation state, see Kymlicka (2007) (n 8): 61–63.

⁴² Samuel Huntington, *The Third Wave: Democratization in the Late 20th Century* (University of Oklahoma Press, 1991).

as liberalization and decentralization.⁴³ Thus, claims for accommodation, ethnic conflicts, violence, civil war, threats of secession and state fragmentation remain major challenges. Some post-colonial African countries attempted to address these challenges by resorting to some form of federation and autonomy but with the exception of Nigeria, all such efforts collapsed within a decade of their establishment.⁴⁴ The failure of the federal experience resulted in centralized unitary governments, imperial presidents and one party rule.⁴⁵ The respective federations failed because they were confronted by strong one-man leadership who thought federalism would lead to state fragmentation and was thus against their own vision of centralized nation building.⁴⁶ The political leaders of such a diverse continent thought federalism in the context of artificially drawn borders might lead to polarization and may in the end put unity and territorial integrity at stake.⁴⁷

Post-colonial African leaders thus resorted to integration as the new leaders thought ethnic divisions will be obstacles to unity and national integration. Integration remained dominant trend within the African continent practised in 80% of the countries.⁴⁸ The big men leaders of post-colonial Africa espousing nation building for the newly independent states aimed to construct single national identity through centralized national institutions and policies. One party state, dissolving federal and quasi-federal arrangements (Ethiopia, Sudan, Cameroon, Kenya, Uganda and several other federations in West and central Africa), the banning of multiparty until the end of the Cold War, imposing national services such as sending high school, university students and peasants to places

⁴³ Hyden (n 5): 58.

⁴⁴ Thomas Franck, 'Why Federations Fail?', in Thomas Franck ed., *Why Federations Fail: An Inquiry into the Requisites for Successful Federalism* (New York: New York University press, 1968): 167–200.

⁴⁵ Ursula Hicks, *Federalism: Failure and Success, a Comparative Study* (London: The Macmillan Press 1978): 4.

⁴⁶ Daniel Elazar, *Exploring Federalism* (Tuscaloosa: University of Alabama Press, 1987): 240–244; Hicks, *supra*: 171–196.

⁴⁷ Goran Hyden, 'Electoral Systems and Political Reform,' in *Constitutionalism: Reflections and Recommendations, Proceedings of the Symposium on the Making of the New Ethiopian Constitution* (Addis Ababa: Inter Africa Group, 1993): 9.

⁴⁸ Alan Kuperman, 'Designing Constitutions to Reduce Domestic Conflict' in Alan Kuperman ed., *Constitutions and Conflict Management in Africa: Preventing Civil War through Institutional Design* (Philadelphia: University of Pennsylvania Press, 2015): 21.

outside of their ethnic origin were part of the integration project and common trend throughout the continent.⁴⁹ Kenneth Kaunda, former President of Zambia is quoted to have said ‘multiparty system would bring chaos, bloodshed and death;’ Cameroon’s long serving President Paul Biya defended one party system as follows ‘a united Cameroon devoid of ethnic, linguistic and religious cleavages.’⁵⁰ An expert observing this dominant trend wrote integration is the existing framework in Africa that has to be pursued because departing from it will not be easy or power holders may react with violence.⁵¹ Yet we know integration (presidential unitary system that imposes one national identity) induced many of the civil wars and conflicts that engulfed African states in the 1980s. The Sudan was the classic example but remained pervasive throughout the continent. Integration and state led nation building in the context of diverse reality was associated with repression and marginalization, major causes of ethnic conflict. It often leads to unstable political system because it promotes centralization often in the hands of the President that represents only a fraction of society combined with winner takes all electoral system making elections *explosive*; marginalization of non-core groups and the construction of single national identity often through coercion fuelling conflicts.⁵² Ethiopia, Sudan, Chad, Liberia, Somalia, Sierra Leone, Congo have among other countries gone through this failed integration projects in the 1980s. In many cases, the state is visible in the capital but beyond that it does not have monopoly over use of violence- one of the pillars of a state. Control over territory is also contested as it is possible that rebels and factional groups may control part of the state. The state is not able to deliver key services (absent state). In some countries

⁴⁹ Crawford Young, ‘The End of the Post-Colonial State in Africa? Reflections on Changing African Political Dynamics in Nic Cheeseman, Lindsay Whitefield, Carl Death eds., *The African Affairs Reader* (Oxford: Oxford University Press, 2012): 41; Hyden (n 5): 64.

⁵⁰ Both leaders quoted in Claude Ake, ‘What Is the Problem of Ethnicity in Africa?’ *Transformation* 22 (1993): 7.

⁵¹ See Kuperman (n 48).

⁵² Kuperman while proposing integration over accommodation admits this risk manifested in Kenya, Nigeria, Sudan and Zimbabwe. See Kuperman (n 48): 19. For a counter argument within the African continent see Nic Cheeseman, ‘How Could We Design Democracy to Make It Work in the African Continent,’ in Charles Fombad and Nico Steytler eds., *Democracy Elections and Constitutionalism in Africa* (Oxford: Oxford University Press, 2021).

such as Ethiopia, some even questioned whether the assumption about the state as provider of security holds water within the African continent as it became a source of abuse and insecurity. The state in Africa is at times framed as ‘criminal state.’⁵³ That was how the countless national liberation fronts’ in Ethiopia were born and brought the regime to its knees in 1991 and wondered whether they should stay in the union or leave leading to the (in) famous article 39 on the right to self-determination and secession: let us see if it works and we go if it fails. The nature of state power in Africa has thus to be problematized, it cannot be assumed.

The concept of nation building and national integration came into attack by various groups particularly in countries that are deeply divided in the 1960s. Instead of nation building, the new perspective became how to manage diversity and ensure unity while accommodating diversity. The chapter on federalism and devolution in Africa: do institutions matter goes to greater detail to explore what form the idea of inclusion and representation takes in federal and devolved systems. It also discusses whether cleavages matter and how it impacts institutional design. For now it is enough to state that political inclusion and representation is fundamental element of polity building and takes different forms. The most common manifestations include devolution, autonomy (federacy), federalism (many varieties) and power sharing schemes. The compelling message is the political systems matter most in polity building. It is a fundamental element of polity building. If this core issues is not addressed, all other relational and exchange theories between the state and society will not bear much fruit. It is also likely that if the political elite in power misses the political integration hardware, it will likely miss the software component of the polity building. The political integration framework impacts all other subsidiary policies of polity building. In other words, if the political system is framed along centralization, it is likely that other supportive policies such as media, language, culture, education and history will also be framed accordingly impacting polity building negatively. If the political system is framed in an inclusive manner, the likelihood of having accommodative and supportive policies is also very high. The political framework defines public policies and remains decisive. It is for this reason that we argue there is strong link between polity building and inclusive political systems. It is the *hardware* of polity building. At

⁵³ Grotenhuis (n 13): 42.

its core is the ideal of creating a just political and economic order in a society. A society living under a just political and economic order owns the thick social contract whose bond can rarely break. Thus, if we unmask all the pretensions, polity building is about having inclusive and representative institutions that have a goal of creating a just political and economic order in a polity. In those systems citizens in *return* support their government and happily identify themselves with the overarching state, its flag, the institutions, army, anthem and other symbols of the state.

As will be elaborated in detail, this is not about the framework alone but also about the *lived reality*. The experience of federalism and devolution in the African continent including Ethiopia is not a happy one both in the past and the present. So promise and design alone will not help, lived reality is what matters. Ethiopia promised autonomy to Eritrea following a UN Resolution (1952–1962) and yet the center’s grand agenda of centralized Amharic speaking nation building framed the federation as an obstacle to its absolute rule and dissolved it within a decade. What followed was not polity building but polity destroying: the secession of Eritrea. The *Derg* pursued a centralized political system by and large and this was followed by military solution to political issue. As a result, by 1991 Ethiopia was on the verge of collapse. The Ethiopian People’s Revolutionary Democratic Front (EPRDF 1991–2018) promised a federal system and yet was very centralized and its system of representation had serious flaws. Representatives from Amhara or Oromia were perceived as *puppets* and party handpicked cadres than genuine representatives of the people they claim to represent. Thus despite the promise, both its operation and its system of representation failed and led to wide spread protests in 2015. It got worst under Abiy who assumed power in 2018 following the protests and resignation of Haile Mariam Desalegn (Ethiopia’s prime minister 2012–2018). Self-rule was fully obliterated and replaced by appointees from Addis in the name of ‘command post’ and representation becomes a farce. Tigray was a living example and as they say, the rest is history. Polity building ended up becoming polity destroying. The lesson is clear: if politics goes wrong, polity building also goes wrong and once again, political integration of society through inclusive institutions and policies (devolution, federalism, power sharing and accommodative public policies) is the hardware of polity building. It is fundamental element of the social contract that defines the power relations between the state and society. It is the thick component of the social contract. All other elements

of polity building we argue are supportive ones. The rest are the software of polity building. The software reinforces the hardware and both combined could make polity building a success.

1.2.2 *Delivery of Public Goods: Functioning State Institutions*

The second component of polity building is the political economy aspect that refers to the resources that are traded between the state and society. These are the public goods provided by the government to society. The provision of impartial security to its citizens (competent army and police), roads, bridges, schools and hospitals as tangible goods are part of the hardware (state building) while the *interconnected society* and the *bond* created as a result of the tangible goods is part of the software of polity building. Irrespective of whether the state is federal or unitary, democratic or authoritarian, there is a *tie* established through the provision of public goods. In return for the critical services and public goods provided by the state, citizens can support government, offer military services and pay taxes. This one may refer as the *thin* social contract between the state and society. Thin because the state could offer better than service delivery through respect for human rights and democratic elections that can better enhance the quality of the social contract. For now let us remain within the thin social contract based on the provision of public goods. A state that is able to deliver such crucial services on equal basis and both in rural and urban areas has already created a *bond* with its citizens. It surely is not strong bond but fair enough there is a tie created. This is one form of relational network or exchange network articulated by Wimmer. The state needs strong institutions (army, security, police, bureaucracy) to deliver public goods and services to society on an equal basis. It is here that state and polity building overlap. State building through strong institutions enhances the sense of relationship between state and society. It builds the software, the invisible bond between state and society. As argued by Wimmer ‘nation building is easier in states capable of providing public goods.’⁵⁴

In most western states, capable state institutions were created way before the start of polity building and democratization during the nineteenth and early twentieth century. In most developing countries,

⁵⁴ Wimmer (n 11): 28.

institution building, democratization and polity building is supposed to be done simultaneously and this complicates the matter. The capacity of the state to collect revenue and mobilize resources to ensure basic services and bring economic growth alongside the private sector sounds simple but remains Africa's major challenge. Most states in Africa have little control over their territory, continue to face legitimacy crisis and do not deliver much outside of their capital. Capacity of the state to deliver (functioning state institutions) which is more about state building than polity building makes a wealth of difference among states.

Provision of public goods and services 'bridge divides, reduce the salience of ethnicity in politics, undermine support for separatism, make violent conflict and war less likely, and eventually lead citizens to identify with the overarching state and perceive it as a community of lived solidarity and shared political destiny despite diversity of one form or another.'⁵⁵ Provision of public goods and services and the socio-economic infrastructure is a *network* that connects citizens among themselves and with the state. It is a bridge that connects communities otherwise divided by language, ethnicity, region or religion. They serve as bridges cutting across divides and walls. There is already a well-established data that shows strongly connected communities or countries rarely go to conflict.⁵⁶ They have a lot to lose. State that delivers public goods on equal basis binds its people irrespective ethnic, religious or other differences. If one gets the services right, one has less to complain and more to identify with the overarching state, citizens know what it means to miss them. Efficient service delivery to citizens on equal basis leaves little incentive for ethno national mobilization. *Functioning state institutions* thus matter for polity building. If there is no ground to complain, why mobilize in the first place? Botswana has been mentioned as a shining example with in the African continent (African miracle) and this is compared with Somalia or South Sudan that lack functioning state institutions owing to years of

⁵⁵ Ibid.: 1.

⁵⁶ David Mitrany, *The Functional Theory of Politics* (New York: St. Martin's Press, 1976); Ashutosh Varshney, *Ethnic Conflict and Civil Strife: Hindus and Muslims in India* (New Haven: Yale University Press, 2002).

civil war, destruction of institutions and neo-patrimonial political systems where clan or ethnic affiliation obstructs state institutions.⁵⁷ Functioning state institutions rob the many causes of mobilization.

1.2.2.1 *State Power in Africa*

This chapter does not aim to explain the nature of state power in Africa and how it impacts the delivery of services. A brief discussion is however relevant to hint how it impacts governance, federalism, devolution (Chapter 4) and constitutionalism (Chapter 6). One of the most difficult issues in Africa is ensuring that power is exercised for *public purposes* and safeguarding constitutional governance that requires the *institutionalization of power*. That is ensuring that public institutions established by the constitution exercise their mandate as defined in the constitution while respecting the limits of power expressed in the form of enforceable human rights, federalism, checks and balances and the rule of law. One of the daunting tasks is to shift the exercise of power from personal rule/party hegemony to institutions by enforcing the supreme law. Without shifting and institutionalizing power, separation of power, rule of law, checks and balances make little sense because the locus of power is elsewhere. If it is the army (as is the case in Egypt, Zimbabwe, Sudan and Nigeria in the past) or the party chair (Ethiopia and South Africa) behind the scene that is king maker, what purpose will serve introducing separation of powers or federalism? Power has to be first institutionalized before it can be separated or divided. While the link between constitutional adjudication and governance and in particular the use and exercise of power is a major issue generally, it brings distinct challenges in the African context.

Max Weber has explained the nature of patrimonial regimes long before Europe shifted to modern state that respects rule of law and exercises checks and balances among the different branches of governments to ensure that power is used for public purposes.⁵⁸ The modern state is *impersonal state* in which the relationship between the ruler and the

⁵⁷ Alex De Waal, *The Real Politics of the Horn of Africa: Money, War and the Business of Power* (Cambridge: Polity Press, 2015).

⁵⁸ Weber (n 2).

citizen is not based on personal ties but on *merit* and technical knowledge.⁵⁹ The state emerges as distinct entity with its autonomy and claims to serve every one impartially and does not promote factional interests.⁶⁰ This is the general framework although big companies and the economic class have over the years somehow compromised this basic foundation. In the patrimonial regimes however, the polity remains the personal property of the ruler that could be an emperor, a big man or one party. According to Fukuyama, in this system ‘the state administration is essentially an extension of the ruler’s household.’⁶¹ As such there is little distinction between private and public sphere. It lacks autonomy and is in the service of political elite and factional interests. In today’s global world, most African states would not call themselves as patrimonial as there is *formal pretension* to adopt constitution with some element of separation of powers, democracy and claim for the rule of law. Yet behind such crude formality the use of public power for private gains and its exercise based on personal, party or ethnic ties is pervasive. Formal rules and institutions cannot stand in the way of the big man or the big party and that is one of the reasons why institution building, federalism and rule of law become difficult because the powerful actors do not adhere to the formal rules.⁶² This state of affairs has been brutally called by Bayrat as ‘politics of the Belly.’⁶³ The merger between crude formality and patrimonial practice

⁵⁹ Some tend to understand this in the literal sense. In divided societies the civil service as well should be inclusive and merit is not necessarily in contradiction with representation. If one has to have a civil servant from the Somali or Afar region, it is possible to have a *competent* Somali or Afar. Merit and representation collide when the system shifts to *symbolic* instead of real and *merit* based representation. EPRDF’s system of representation was nominal, not real representation. The OPDO and ANDM symbolically represented the Oromo and the Amhara but were never considered as real representatives of both groups hence the 2015 protests. Same problem continued under Prosperity Party.

⁶⁰ Hyden (n 5): 66; Fukuyama himself provides mounting amount of evidence about what he calls the re-patrimonialisation of the state in the west resulting in the 2008 global economic crisis (Fukuyama [n 31]).

⁶¹ Fukuyama (n 31).

⁶² Hyden (n 5): 67–68. Botswana, Mauritius and sometimes South Africa are considered as exceptions. South Africa seems slowly joining the neo-patrimonial club. Despite strong judiciary, scandals after scandals are reported in the President’s office, local government and the African National Congress (ANC) seems to be losing influence over its members.

⁶³ Jean Francois Bayrat, *The State in Africa: The Politics of the Belly* (London: Longman, 1993).

is referred by some as *neo-patrimonial* regime or the extractive state.⁶⁴ The political elite in power continues to control (*capture*) state institutions and through that the massive resources that it commands, creates patronage at different levels. In what Alex De Waal calls ‘political budget’ the rulers spend a big part of the country’s resources to pay for political loyalist with little left for public goods without accountability as if it is private resource.⁶⁵ Informal and personalized power, the conception of power and the country’s asset as if it is the ruler’s private affair, the resources at its disposal creates favorable condition for the incumbent to win elections.⁶⁶ Beneath the formal institutions, the ruling party (imperial president or big man) distributes the spoils of office to its supporters and punishes dissenters.⁶⁷ Despite constitutional principles, it also determines who may be engaged in politics and the space available for such engagement, most often used tool being to divide and rule the opposition and weaken it. The informal networks weaken (or even override) formal institutions undermining their ability to *deliver impersonal public services*.⁶⁸

African leaders exhibit the above features but some are outrageous than others. Nigeria’s oil wealth and the corruption associated with it are well known. Transparency international ranks Nigeria 154 out of 180 in the 2021 corruption index, in the high list.⁶⁹ Prime Minister Abiy boldly and arrogantly explained (*Chaka Project*) his new palace project estimated to cost nearly equal to the country’s annual budget to members of parliament in 2022 briefing them they can visit the project site but have no mandate to ask where the money comes from and how the project is

⁶⁴ Acemoglu and Robinson (n 2).

⁶⁵ Alex De Waal, ‘When Kleptocracy Becomes Insolvent: Brute Cause of the Civil War in South Sudan,’ *African Affairs* 113:452 (2014): 347–369.

⁶⁶ Hyden (n 5), *supra*, 95.

⁶⁷ Michael Bratton, ‘Vote Buying and Violence in Nigerian Election Campaigns,’ *Electoral Studies* 27:4 (2008): 621–632.

⁶⁸ Patrick Chabal and Jean-Pascal Daloz, *Africa Works: Disorder as Political Instrument* (Oxford: James Currey, 1999).

⁶⁹ Ebenezer Obadare, ‘Nigeria’s All too Familiar Corruption Ranking Begs Broader Questions Around Normative Collapse,’ Council on Foreign Relations, available at <https://www.cfr.org/article/nigerias-all-too-familiar-corruption-ranking-begs-broader-questions-around-normative>.

being executed.⁷⁰ At a time where no less than twenty million people are in need of aid⁷¹ and more than 5.1 million are internally displaced (one of the highest in the world)⁷² due to drought, brutal civil war and conflicts, he is fascinated by palace project, parks and tells parliament, he is not going to account to them and the members listen and laugh!

To ensure that political power is used for public purposes, there is a need to shift the locus of power from personal or party level to impersonal institutions and regulate it through the rule of law and the system of checks and balances. Meritocratic bureaucracies in the civil service, system of checks and balances (both horizontal and vertical) and independent bodies such as Supreme Court or constitutional court with a mandate to enforce the constitution (both to the ruler and ruled) are time tested institutional safe guards against neo-patrimonial regimes. Without these reforms, it is hardly possible to speak and write about federalism (and autonomy of sub-units) and constitutionalism as they remain victims of hegemonic center.

1.2.3 *Public Policy*

The third component of polity building relates to *public policy*. Here we include language, culture, media, anthem, flag, symbols and monuments, museums, legal and education systems and not least, history. Each of them merits a book on their own but the intention here is to show the link with polity building. Whoever thinks public policy is a neutral crafting of policy has to rethink his/her perspective seriously. These policies are results of the political framework we identified already. Public policy is an instrument of a political project and its link with polity building is direct. Gellner wrote, at the height of the centralized nation state, centralized education system was the most important tool for nation building.⁷³ Public policy also demonstrates whose story is being *institutionalized*

⁷⁰ See his speech, available at <https://www.youtube.com/watch?v=wTQCMjXth4I>.

⁷¹ See USAID update, available at <https://www.usaid.gov/humanitarian-assistance/ethiopia>.

⁷² See report Internal Displacement Monitoring Report, available at <https://www.internal-displacement.org/countries/ethiopia#:~:text=Disasters%2C%20mostly%20floods%20and%20drought,%2C%20Oromia%2C%20Somali%20and%20SNNP>.

⁷³ Gellner (n 33).

and narrated and which ones are thrown to dustbin of history.⁷⁴ Those reflected in the policy remain in the institutional memory for generations, they are nurtured and promoted using state resources while those not included are *erased* from history. That explains very well why issues related to identity and public policy such as language, symbols, culture, religion and history remain emotionally provocative. They are strongly linked to identity and symbols. What do we want to achieve by using these policies? Are these policies instruments of centralized political project or an accommodative policy that complements the political integration project? Public policy has both practical and symbolic importance. For example, the symbols that we put in currency and coins are sometimes carefully crafted to manifest diversity. If crafted carefully to be inclusive, citizens often identify themselves with the state particularly if the political integration project is crafted right. It is also possible to have such symbols representing only a section of society. In Sudan, the tension between north and south Sudan before its secession was partly related to the symbols inserted in the flag, streets (named in Khartoum after major traders of slaves from the South), coins and the currency with the South Sudanese elite rejecting the symbols set by the north. The northern elite identified itself as part of the Arab and Islamic world while the Southerners' think they are Africans. The policies that emanate from these two divergent political frameworks cannot stand side by side thus combined with other factors resulted in the secession of South Sudan in 2011.⁷⁵

Same is true with history. Is the history written in a more balanced and inclusive way or is it written to reflect the history of the state and its institutions alone, chronicling as it is often called in a selective way? A brief reflection is in order here. While conducting my PhD thesis in Utrecht in the Netherlands (2001–2005) writing the first chapter (the political and historical context that led to the federal system in Ethiopia) was the most difficult part. Here is the reason. I read several books

⁷⁴ Basta (n 38): 46.

⁷⁵ Omer Awadalla Ali Gasmelseid, *Federalism as Conflict Management Device for Multi-ethnic and Multicultural Societies: The Case of Sudan* (Bale: Helbing & Lichtenhahn 2006). Certainly, the civil war in Sudan was not limited to symbols only but suffice to mention here symbols also played their role.

on Ethiopia (history and politics). Teshale Tibebu,⁷⁶ Gebru Tareken,⁷⁷ Bahru Zewde,⁷⁸ Mohamed Hassen,⁷⁹ Richard Pankhurst⁸⁰ and Harold Marcus.⁸¹ The books are predominantly on modern Ethiopia covering more or less the same period. One can include to this list John Markakis⁸² (anatomy on political history of Ethiopia, classic work published in 1974) and the careful analysis of history by Triulzi.⁸³ After reading these books, one cannot help but conclude as if the books refer to the history of different countries, not the same country Ethiopia. One narrates the history of the state and its institutions following the trend of chronicling the ruler's history: very centrist approach. It leaves out the history of the periphery and the peasant struggle. The other narrates about the suffering of Ethiopian peasants in the hands of brutal state. One narrates the life of the marginalized groups ('people without history') and one about history of Oromo trying to find their place within Ethiopia or beyond. Triulzi carefully explains the paradox and makes some sense linking the idea of history and how it relates to polity building and the political background of the authors. How do we reconcile the fundamental paradoxes? Ethiopia claims to be the only independent state in Africa and that should imply the people who have inhabited the country have a long history not so much disturbed by colonial history. The role of the historian is to demonstrate the rich history of the people and how they have interacted (both in the negative and positive sense) with the state and its institutions linking the part and the whole through synthesis in an *inclusive and impartial way*.

⁷⁶ Teshale Tibebu, *The Making of Modern Ethiopia 1896–1974* (Lawrenceville, NJ: The Red Sea Press Inc., 1995).

⁷⁷ Gebru Tareke, *Ethiopia: Power and Protest: Peasant Revolts in the Twentieth Century* (Cambridge: Cambridge University Press, 1991).

⁷⁸ Bahru Zewde, *A History of Modern Ethiopia 1855–1974* (Athens, OH: Ohio University Press, 1991).

⁷⁹ Mohammed Hassen, *The Oromos of Ethiopia: A History 1570–1860* (Cambridge: Cambridge University Press, 1990).

⁸⁰ Richard Pankhurst, *Social History of Ethiopia* (Red Sea Press, 1992).

⁸¹ Harold Marcus, *A History of Ethiopia* (Berkeley: University of California Press, 1994).

⁸² John Markakis, *Ethiopia: Anatomy of Traditional Polity* (Oxford: Clarendon Press, 1974).

⁸³ Alessandro Triulzi, 'Battling with the Past: New Frameworks for Ethiopian Historiography,' in Wendy James, Donald Donham, Eisei Kurimoto, and Alessandro Triulzi eds., *Remapping Ethiopia: Socialism and After* (Oxford: James Currey, 2002): 276–289.

We know from practice teaching history has become very controversial because some perceive, it is not reflective of the whole, only tells part of it and thus is not inclusive. In some cases it could even be pejorative. It is as controversial as the country's political system. A more balanced, inclusive rewriting of history has an impact on the polity and kind of society we want to have. Exclusive and pejorative history and the chronicling of the history of the state and its centrist institutions is counterproductive for polity building, could indeed be tool for 'nation destroying.' Those who think their history is not included, deliberately neglected⁸⁴ or has been misrepresented, will write (or rewrite) their history. The last five decades has been deconstruction of history. We will then have many histories, not one and different imagined or real communities will follow. That is the foundation for further crack in the system.

Culture, media and language policies suffer from the same limitation. Indeed the controversy over history applies to these sectors as well. What is the language policy? Does it promote pluralism or force others to assimilate? Some talk even today on the need for 'national language.' This is not only counterproductive but it has been tried and failed. Haile Selassie and the Derg imposed Amharic as a national language and besides to the political crisis added fuel to fire ending in the failure of the project in 1991. Ethiopia as the chapters will show is multinational and one cannot impose one selected language to be 'national' and then nurture and promote it at the expense of other languages and identities. It is also good to realize the fact that even if all Ethiopians were to speak one language, our problems will not go away. Somalia is a text book example. It was considered in the 1960s, the only blessed African nation state with people speaking the same language and professing the same religion and having their own

⁸⁴ In many writings and public displays in Addis Ababa, it is common to see photos of different rulers of modern Ethiopia starting from Emperor Tewodros. Emperor Tekle Giorgis (short lived emperor from Agaw) and Emperor Yohannes IV (Tigrayan) are deliberately left from the narrative as if they never existed. In one of Bahru's book (*Pioneers of Change in Ethiopia*: James Currey, 2002: 134) Blata Haylemariam, peasant leader who evicted Shown rule from entire Tigray in 1943, is mentioned as *a certain Blata*, kind of footnote. Never did he realise that Hailemariam's torch will kindle again in 1975 in a more radical form. The new regime that assumed power in 2018 did all it can to undo Meles Zenawi's major projects including Africa's biggest dam and has been excluded from the narrative. Alula- Africa's army general who defeated the Italians, and the Egyptians in the nineteenth century is nowhere in the narrative although Ethiopian's claim they are the only 'un colonized country' in Africa and this was due to mainly Alula's role. Ethiopia's paradox has no end!

government. Speaking the same language and professing same religion did not however save Somalia from collapse in 1991.

Whose culture is presented in public, in the media and formal events? Whose culture and language is nurtured and promoted and which ones are sidelined and why? Do we sense what the implications are? Is the cultural policy accommodative or is it still reflection of old Abyssinia? how does one create symbiosis between the individual cultures and the interaction among them and find a shared one? Symbols, museum and monuments could be part of the problem or the solution as well. Who are our heroes and heroines? Do we have shared ones or are we also divided on this? It seems some one's hero is the other's traitor? Emperor Menlik is portrayed as Ethiopia's symbol of unity on one side and a 'colonizer and traitor' by the other. What is the role of the media in this regard? Is it promoting shared values or is it a tool for centralized policy and propaganda? Is it promoting tolerance and mutual existence or hatred and animosity? What is the guiding policy and is it inclusive or exclusive? Are we nesting or fragmenting society? The flag is even more controversial and since the new government came to power in 2018, we do not even know which one is Ethiopia's flag? It is supposed to represent the people and the country but as we know it, it remains the most divisive one. We are divided at the point where we were supposed to be united. So our athletes suffer because of our division when they are supposed to celebrate after winning a race. Some chose one type over the other: they cannot be immune from our divisions. At the moment, it is the author's view that we are in disarray when it comes to public policies, same way we are at the political level. Public policies are truly part of the software of polity building. They are results of deliberate political choice crafted to achieve a certain goal. Carefully crafted and inclusive public policies including the flag have the potential to nest different identities cutting across the divisions while the opposite happens when such policies are reflections of a narrow section of society. Inclusive public policies build the sense of belonging to the system, same way as inclusive political system. Exclusive and narrowly based public policies build the sense of isolation and ethno nationalism and thus could facilitate state fragmentation.

Certainly quality of leadership remains critical for polity building. The differences between American founding father George Washington and Napoleon Bonaparte of France is visible although both led major Revolutions in their respective countries. The former served his country for eight years and despite popular call for another term, he resisted and chose a

democratic way setting limited term for office and constitutionalism. The latter chose to be French emperor and military despot.⁸⁵ Selfless leaders like Nelson Mandela, former President of South Africa can unify deeply divided country by race and inequality cutting across the divides. Divisive, corrupt and incompetent leaders could on the contrary fuel animosity and fragmentation in society. Often referred as banal nationalism, with supportive political and public policy instruments (otherwise could also be divisive) sporting activities such as football and athletics play as well their role in unifying people, despite differences of one type or another.⁸⁶ Yet sport alone can do little, it can serve only as supportive instrument to the hardware of polity building. Yascha Mounk, in otherwise comprehensive work⁸⁷ mentions *patriotism* (love and loyalty for one's country) as unifying factor but does not explain how citizens and minorities treated as second class citizens in their country would love their country and become patriots. In some cases those citizens and minorities are victims of centuries of marginalization and to expect these sections of society to fall into an abstract love to an otherwise brutal political system (criminal state) is more myth than reality. As mentioned already, ethno national minorities resent such hierarchy and assert self-government and even aim to secede, if the social contract is not renegotiated. Patriotism comes only when there is an inclusive political and economic order, it does not come in the abstract.

Polity building is not a onetime exercise. It is also not a job of one generation only. So long as the society exists, polity building should also exist in tandem with it. It is an incremental process where the new generation is supposed to build on it and hand it over to the new one. It is a never ending process unless the polity ends by fragmentation which on its own brings another issue of polity building in the new state.

⁸⁵ See Mathew Flynn and Stephen Griffin, *Washington and Napoleon: Leadership in the Age of Revolution* (Washington, DC: Potomac, 2012).

⁸⁶ See Mylonas (n 7).

⁸⁷ Yascha Mounk, *The Great Experiment: Why Diverse Democracies Fall Apart and How They Can Endure* (New York: Penguin Press, 2022).

1.3 THE NATION STATE

Experts make a useful distinction between the nation state and nation building. 'Creating an independent nation-state with a flag, its government, territory, an army, an anthem, newly minted money, and freshly printed passports did not guarantee that citizens identified with the nation or that they accepted the authority of the state.'⁸⁸ Creating a nation state does not mean nation building is accomplished. They are two separate political processes. Once the nation state is created, the state deploys enormous resources at its disposal to build the polity, that is, a massive work on the people to build a sense of shared common hood that prevails over and above other forms of manifestations of identity. The nation state has ideology that aims to turn 'peasants to French men.'⁸⁹ The Italian revolutionary Garibaldi is quoted to have said, 'we now have Italy, let us make the Italians.'⁹⁰ He united southern and northern Italy in 1861, created a country called Italy but he knew this does not make the Italian nation. The idea of instilling in very Italian the sense of nationhood, shared identity, the software that unites all citizens of the country despite other differences (religion, region, or other manifestations of identity) is a much more complicated matter. The peasants do not automatically become French even if the French territory with its flag and government is created. The same applies to other states. Getting the right ideology, that is, the framework for political integration, state building and public policy to build shared common hood is a daunting task and a never ending exercise. In this sense polity building is not a new concept. It is an old one. There were many advocates of the nation state (like John Stuart Mills), but the pioneer author is undoubtedly the German philosopher, Herder. He invoked the authority of God in his revelation that 'best political arrangements obtain when each nation forms a state of its own.' He also described as 'unnatural' states in which there is more than one nation; 'they become oppressive and doomed to decay.' He further stated that 'only one language is implanted in an individual, only to one does

⁸⁸ Wimmer (n 11): 3.

⁸⁹ In France when various regional, peasant populations who spoke Provençal, Aquitaine, Basque, and so on were assimilated into the French nation. See Eugen Weber, *Peasants into Frenchmen: The Modernisation of Rural France, 1870–1914* (London: Chatto and Windus, 1979).

⁹⁰ Denis Mack Smith, *Garibaldi: A Great Life in Brief* (New York: Knopf, 1956).

he belong entirely, no matter how many he learns subsequently.’ Consequently he drew the conclusion that ‘A group which is a nation will cease to be one, if it is not constituted into a state.’⁹¹

Nationalism is one of the contested concepts. In the most widely used notion, it is ‘in general a necessary condition of free institutions that the boundaries of government should coincide in the main with those of nationalities.’⁹² Ernst Gellner, also wrote nationalism is a ‘political principle, which holds that the political and the national unit should be congruent.’⁹³ The process of establishing the nation state has gone through several courses. The nation state become prominent at the end of the eighteenth century and remained as hegemonic framework until 1960s.⁹⁴ The genesis of the ‘nation state’ is widely associated with the rise of the European system of states beginning Westphalia in 1648 (no state shall interfere in the affairs of the other) and the next two centuries, particularly the eighteenth century with the emergence of popular sovereignty and self-determination (the French and American Revolutions⁹⁵) giving birth to the nation states.

Earlier on empires, kingdoms, caliphates dominated the world scene for centuries. In these forms of entities, the relationship between the ruler and ruled remained largely a relation of *master and servant* where the ruler could bring different entities together or break them apart without concern to the wishes of the people.⁹⁶ The treaty of Westphalia brought to an end thirty years of civil wars in Europe and gave birth to the global order of nation states along with sovereign statehood. Although presented as religious war between Protestants and Catholics,

⁹¹ Quoted in Elie Kedourie, *Nationalism* (New York: Frederick A. Praeger, 1960).

⁹² John Stuart Mill, ‘Representative Government,’ in Geraint Williams ed., *Utilitarianism, on Liberty, and Considerations on Representative Government* (London: Everyman, 1993 [1861]): 394.

⁹³ Gellner (n 33): 1.

⁹⁴ Loughlin (n 8): 2. Decentralization and demands for accommodation by territorially based cleavages forced many nation states in Europe to open up space for self-government and political autonomy since 1970s. Spain, Belgium, UK are examples. Ibid.: 12.

⁹⁵ The French Revolution of 1789 brought the nation state (Jacobin, centralized indivisible unitary state after annihilating those who proposed decentralization) while the American Revolution established a decade old Confederation that later led to the US Federation of 1789. Switzerland and to some extent UK remained a few exceptions to the nation state. See Chapter 2 for details. John Loughlin (n 8): 7.

⁹⁶ Grotenhuis (n 13): 19.

the war was fought between emerging nation states (France, Netherlands, Sweden) on one hand and German and Spanish army on the other pushing for great empires with the latter losing the war.⁹⁷ Indeed as Tilley wrote, ‘war and war settlements have been the great shapers of the European state system.’⁹⁸ In addition to Westphalia, the Congress of Vienna (1815) that followed the defeat of Napoleon and reorganization of parts of Europe, the Treaty of Versailles (1919) that led to the collapse of Austro-Hungarian and Ottoman Empires⁹⁹ after WWI, the settlements that followed the Second World War,¹⁰⁰ the decolonization process after WWII, the end of the Cold War and the disintegration of the Soviet Union and Yugoslavia resulted in the making and unmaking of states. World War I and II and the end of the Cold War in particular resulted in the defeat of several empires and the birth of new nation states. The overall process resulted in fourfold increase in number of states (from 50 to 194) most of it related to collapse of empires or fragmentation of bigger states,¹⁰¹ so much so that the saying goes ‘nations are made by ‘blood and iron.’¹⁰² Since its emergence in Europe, the nation state has remained as a dominant framework not only in Europe where it was conceived but also elsewhere in the world.¹⁰³ The marriage between the nation and the state is reinforced by the ideology of nationalism with its ideal of a culturally homogeneous society, reinforcing the state with legitimacy and loyalty.

⁹⁷ See Yoram Hazony, *The Virtues of Nationalism* (New York: Basic Books, 2018).

⁹⁸ Charles Tilley, *The Formation of National States in Western Europe* (Princeton: Princeton University Press, 1975): 75.

⁹⁹ It ruled Turkey, Greece, Egypt, Bulgaria, Jordan, Lebanon, Romania, Palestine and parts of North Africa for six hundred years.

¹⁰⁰ Tilley (n 98): 75.

¹⁰¹ Marc Sanjaume-Calvet, ‘Reconciling Liberal Democracy, Nationalism and Political Divorce,’ in Alain-G. Gagnon and Michael Burgess eds., *Revisiting Unity and Diversity in Federal Countries: Changing Concepts, Reform Proposals and New Institutional Realities* (Leiden: Brill, Nijhoff, 2018): 375; see also Marina Ottaway, ‘Nation Building,’ *Foreign Policy* (2002): 17.

¹⁰² This is speech made by Otto von Bismarck in 1862 who played a role in unifying Germany. For details See Charles Tilly ed., *The Formation of National States in Western Europe* (Princeton: Princeton University Press, 1975): 75.

¹⁰³ John Markakis, Gunther Schlee, and John Young, ‘Introduction,’ in John Markakis, Gunther Schlee and John Young eds., *The Nation State: A Wrong Model for the Horn of Africa* (Max Planck: 2021): 10.

Alongside the making and unmaking of territorial boundaries, by the end of the eighteenth and early nineteenth centuries, new political and philosophical ideas emerged that shifted the *locus of power* from *divine right* to rule claimed by emperors and caliphates to the idea of *consent* of the governed: the principle that power/sovereignty comes from the people. Self-government and self-determination made the nation to have its own government. The people who declare themselves as a nation become source of sovereignty and affirmatively identify themselves with it.¹⁰⁴ The nation state is about *identity*- collective self-identity and subjective one that members of the nation think they share as a group.¹⁰⁵ As Connor stated, 'The essence of the nation is not tangible. It is psychological, a matter of *attitude*, rather than of fact... nation is a self-differentiating group...with a popularly held *awareness or belief* that one's group is *distinct*'¹⁰⁶ from others. A further point that distinguishes it from an ethnic group is that the nation makes territorially based claims for self-government (often internal self-determination that if denied and depending on state response or lack thereof could evolve into secession) and thus has a political ambition.¹⁰⁷ It is not a mere anthropological fact. An ethnic group may share same language and culture based on myth or reality but has no political ambition for self-government or a claim to a particular territory.¹⁰⁸ The relationship between groups and the boundary for differentiation could be based on language as in Canada, Ethiopia or religion as in Northern Ireland (Catholic vs. Protestant) and the Sudan (South Sudan before 2011). As it is both self and others defined, interaction both vertical and horizontal (competition for power, resources and reaction to other groups and state policy) are critical part

¹⁰⁴ Grotenhuis (n 13): 20.

¹⁰⁵ Ibid.: 28.

¹⁰⁶ Connor (n 9): 337.

¹⁰⁷ Michael Keating, 'So Many Nations, So Few States: Territory and Nationalism in the Global Era,' in Alain-G. Gagnon, James Tully eds., *Multinational Democracies* (Cambridge: Cambridge University Press, 2001): 44. Demand for self-government based on historical construction is not necessarily tied to secession although that may come if the state denies or fails to respond after significant delay. In most cases it can be accommodated using variety of options: decentralized unitary system, power sharing, federalism, autonomy, and asymmetry. Central government can deploy menu of options to address such demands.

¹⁰⁸ Miller (n 17): 302. If the ethnic group demands self-government or claims to a territory then it becomes a nation.

in the definition of the nation. The interaction and reaction process results in reconstruction of the nation. Having functioning state institutions is vital but is not enough for polity building. Belgium, the UK, Canada and Spain have those institutions but they have the Flanders, Scottish, Quebec and Catalan problems that continue to threaten the core nation. There, the nation projected by the state collides with the nation projected by Flanders, Scottish, Quebec and Catalan respectively. Many have thought nationalism will wither away, if political inclusion and access to economy are ensured but that never happened and the Scottish, Quebec, Catalan nationalism are living examples demonstrating that it goes beyond political and economic inclusion.¹⁰⁹ In fact three of these sub-units are economically rich regions but that has not stopped them from asserting self-government and secession. Nationalism is dynamic and may take different forms across time.

Yet, in most developing countries, political and economic injustice caused by the state remains at the heart of identity based mobilization (relative deprivation theory: systematic and identity based deprivation of groups from power and resources/economy¹¹⁰) but the search for dignity, demand for recognition, collective security and self-esteem are the core factors that flames and gives it the emotive force. While the relative deprivation theory focuses on the power and resource element, the human needs theory¹¹¹ goes much further than that to include the need for collective security, right to exist as a group, prevention from threats of genocide and ethnic cleansing- the passions and emotions beyond the material interests of ethno national minorities.¹¹² The gist as argued by Connor goes 'Better a government run like hell by Filipinos than one run like heaven by Americans.'¹¹³ There is this pejorative that comes with the

¹⁰⁹ Gidon Gottlieb, *Nation Against State: New Approach to Ethnic Conflicts and the Decline of Sovereignty* (New York: Council on Foreign Relations Press, 1993): 25–26.

¹¹⁰ Ted Robert Gurr, *Minorities at Risk: A Global View of Ethnopolitical Conflict* (Washington: United States Institute of Peace Press, 1993): 18–20; see also Sujit Choudhry and Nathan Hume, 'Federalism, Devolution and Secession: From Classical to Post-Conflict Federalism,' in Tom Ginsburg and Rosalind Dixon eds., *Comparative Constitutional Law* (Cheltenham: Edward Elgar, 2011): 364.

¹¹¹ See for details John Burton, *Violence Explained* (Manchester: Manchester University Press, 1997): 32–37.

¹¹² Dawn Walsh, *Territorial Self Government as Conflict Management Tool* (Cham: Palgrave Macmillan, 2018): 4–5.

¹¹³ Connor (n 11): 343.

concept of a ‘minority’ framed by the majority (when there is one) that the former want to end. It implies such a group has no voice or has only less voice. The response from the non-core group or the ethno national minority is why become a mayor when one can be a president in a new nation state? Why remain as a minority of say 20% when one can be a 100% majority in one’s own new nation state.

As indicated above, the nation state *replaced* the different kind of loose imperial and confederal political units that existed in Europe. It prescribes that the nation and its political boundaries should coincide so that states would be nation states.¹¹⁴ In its most extreme form, it required every state must contain within itself one and not more than one culturally homogenous nation, that every state should be a nation and that every nation should be a state.’¹¹⁵ This political framework (with a few exceptions) remained as dominant one across the globe until the 1960s. Yet the nation states ignores the fact that it was historically created to satisfy the *particular historical needs of state formation* in Europe where there existed shared history, culture, language and affiliation with the state constructed by nationalism. In many cases a majority nation existed that controlled the state or else the state constructed them by force.¹¹⁶ Two typical models of the nation state were France (with its assimilation policy) or the United States as integrationist state with its ‘melting pot’ ideology and rooted in individual rights. These were the two ‘nation state’ models that many aspired to replicate in their respective countries.¹¹⁷

¹¹⁴ Genevieve Nootens, ‘Can Non-Territorial Autonomy Bring an Added Value to Theoretic and Policy Oriented Analysis of Ethnic Politics?’ in Malloy, Tove, and Francesco Palermo eds., *Minority Accommodation Through Territorial and Non-Territorial Autonomy* (Oxford: Oxford University Press, 2015): 38.

¹¹⁵ Stepan, Linz, Yadiv (n 13): 1.

¹¹⁶ Ephraim Nimni, ‘Minority Accommodation through Territorial and Non-Territorial Autonomy,’ in Tove Malloy and Francesco Palermo eds., *Minorities and the Limits of Liberal Democracy: Democracy and Non-Territorial Autonomy* (Oxford: Oxford University Press, 2015): 57–58.

¹¹⁷ See Will Kymlicka (n 8): 42; Stepan et al. (n 13): 3.

There are wide spread claims about the American system being considered as ‘civic nation,’¹¹⁸ people sharing common political institutions irrespective of language, religion or other cultural markers.¹¹⁹ Yet Kymlicka¹²⁰ and many others have disclosed that the ‘American nation’ has also ethnic origins: the white Anglo Saxon protestant (WASP) as a founding nation. This is clearly stipulated in the *Federalist Papers No. 2* as follows ‘Providence has been pleased to give this one connected country to one united people—a people *descended from the same ancestors*, speaking the *same language*, *professing the same religion*, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established general liberty and independence.’¹²¹ The American system has slowly and painfully learned to open space for African Americans, women, the poor and the first nations (Aboriginals’) and yet only in the twentieth century. No surprise the *same English speaking group* enjoys *majority at federal and constituent unit level* and thus is rightly called as *homogenous* federation as it does not institutionally respond to minority rights. With the French, there is no such pretension.

Thus, the nation started in France but was later adopted in Spain (1970s), Belgium (before it federalized in the 1990s), Portugal, Greece, Italy after unification and many more countries in Europe and the rest of the world.¹²² Westphalia focused on territory, interstate relations and sovereignty but gave little attention to the aspiration of the people. The link between the nation and state through self-determination had to wait

¹¹⁸ There are some who propose ‘civic’ as opposed to ethno national based identity in Ethiopia, a deeply divided country. It is now very clear the civic proposal (*Zegenet Politica or Ethiopiawinet*) if unmasked from its pretentions is the centrist elite’s vision of Ethiopia—a deeply ethnic one manifested through the three color flag (green, yellow red), Amharic speaking, Orthodox and centralized Ethiopia. Civic nationalism is thus a *mask* for another form of ethno nationalism in Ethiopia or elsewhere.

¹¹⁹ See for example Nicole Topperwein, *Nation State and Normative Diversity* (Fribourg: Institute of Federalism, 2001).

¹²⁰ Kymlicka (n 8).

¹²¹ *The Federalist Papers: No. 2*.

¹²² Loughlin (n 8): 7–8.

until the French Revolution. Yet even then this was not realized in East Europe and the Soviet Union, it came after the end of the Cold War.¹²³

In Africa, it made its way because of colonialism, modernization, and globalization in different periods but was framed as centralized integration scheme even if the core nation was absent or a particular minority controlled power and pushed the agenda of nation building. Markakis, Young and Schlee wrote the European model was ‘transposed to Africa, a vastly different world, without the slightest concession to its uniqueness and the results has been tragic.’¹²⁴

Space will not allow diagnosing all source of governance crisis in Africa. Yet two factors stand tall as major causes of governance crisis. The nature of state power (treated in the previous section) and managing cleavages. The African continent continues to defend artificial colonial borders and thus conflicts continue between sub national and regional groups that demand adjustment to colonial borders and leaders that prefer to keep statuesque. While the *Third Wave* democratization and liberalization were hoped to improve the state of affairs in Africa, the reality is grim.¹²⁵ An expert assessment shows ‘By the end of 1998 only nineteen countries had stable political conditions; at least eleven countries were encountering political crisis and turbulence, and eighteen countries were engaged in armed conflict or civil strife. This means that toward the end of the 1990s less than 40 percent of sub-Saharan African countries enjoyed relative political stability. Almost 25 percent faced serious political crisis, while a staggering 38 percent were wracked by violent conflicts.’¹²⁶ A report issued by the Peace and Security Council of the African Union as recent as February 2023 confirms there is no progress since then. ‘As the analysis below reveals, the peace and security situation on the continent remains bleak with the deteriorating security and humanitarian situation showing no sign of abating.’ The Ethiopian case, being the most outrageous, resulting in the death of millions of people in so short period of time demonstrating its highest level of

¹²³ Gidon Gottlieb (n 109): 24–25.

¹²⁴ Markakis, Schlee and Young (n 103): 13.

¹²⁵ See Catharine Newbury, ‘State at War: Confronting Conflicts in Africa,’ *African Studies Review* 45:1 (2002): 1–20.

¹²⁶ Adebayo Adedeji, ‘Comprehending African Conflicts,’ in Adedeji Adebayo ed., *Comprehending and Mastering African Conflicts: The Search for Sustainable Peace and Good Governance* (London: Zed Books, 1999): 4–5.

brutality.¹²⁷ Sudan, Nigeria, Ethiopia, Democratic Republic of Congo, Kenya, Mali and Niger (Tuareg), Morocco, Tanzania, Angola, Cameroon, Somalia, Senegal, Zambia and Namibia (Lozi) faced tragic conflicts and have insurgents of one type or another, albeit to varying degrees of mobilization.¹²⁸

Next section explains the paradoxes that the nation state continues to face when confronted with rival ethno national groups.

1.4 THE PITFALLS OF THE NATION STATE

1.4.1 *Coercion and Polity Building*

The problem of the nation state begins from its process of formation, conception and its normative assumptions. In the first place, it was a *coercive process* that brought together communities into one political regime.¹²⁹ This is not only true in the past as in the emergence of nation states in Europe but also in the newly born ones after the end of the Cold War, be it Eritrea, South Sudan or the Balkans. They are predominantly results of wars. The process of trying to achieve nation building through assimilation of non-core groups to the core nation was also coercive one. The normative prescription of the nation state was that state led project of assimilation or integration need to eradicate cultural differences of minorities for the nation state to prevail. The different public policy instruments were designed to achieve that goal. As McGarry, Keating and Moore argued, ‘The coercive policies to achieve linguistic and cultural homogeneity in France to create a single French nation attests to the fear and concern that cultural difference would translate into political difference

¹²⁷ Olusegun Obasanjo, Ethiopian civil war: How we brokered peace, available at <https://dailytrust.com/ethiopia-civil-war-how-we-brokeredpeace-obasanjo/> see also report issued by the Peace and Security Council of the African Union by Amani Africa Media and Research Services, available at <https://amaniafrica-et.org/the-peace-and-security-council-in-2022-the-year-in-review/>, February 23, 2023.

¹²⁸ Lotje De Vries, Pierre Englebert, and Mareike Schomerus eds., *Secessionism in African Politics: Aspiration, Grievance, Performance, Disentrancement* (Cham: Palgrave Macmillan, 2019).

¹²⁹ Grotenhuis (n 13): 33–34, 90. One needs to remember Charles Tilly’s famous statement: ‘War makes states and states make war.’

and thus has to be eliminated.’¹³⁰ Nation and state builders have always feared that ‘the failure to homogenize increased the likelihood that a state [...] would fragment into its cultural subdivisions.’¹³¹

The defining element of the nation-state in addition to its coercive nature was thus its insistence for assimilation and homogeneity. Every state was to be congruent with its nation and every nation with its state. Where this was not the case (this was the most predominate one) public policy and political action had to force everyone to assimilate into the chosen nation. In some cases states had to go to war with minorities outside of their state boundaries in an effort to conquer the territories where their fellow nationals lived and either exterminate or expel those not of the same nationality. The greater Somalia project along with its five star blue flag was the classic case that aimed to bring all Somalis in the Horn under greater Somalia essentially leading to its collapse in 1991. We are aware of the nationalist wars designed to reunite parts of the nation with the national state in Europe and the rest of the world during the two World Wars.

The state deployed enormous resources and an ideology to ‘nation-ize’ non-core groups. Several theories were developed to serve this purpose. In the 1950s and 1960s all schools of thought such as Marxism, modernization, liberalism, globalization, irrespective of their differences predicted the demise of ethno cultural diversity and the triumph of the nation state. Marxists predicted with triumph of proletariat and universal socialism, nationalism will wither away. The proletariat is global and has no nationality was the slogan. Liberalism assumed with respect and protection of individual rights minorities will either assimilate or integrate into the dominant nation. Karl Deutsch representing the dominant American modernist view argued that modernization and increased social communication would erode differences (1953).¹³² Eric Hobsbawm as

¹³⁰ John McGarry, Michael Keating, and Margaret Moore, ‘Introduction: European Integration and the Nationalities Question,’ in John McGarry and Michael Keating eds., *European Integration and the Nationality Question* (London: Routledge, 2006): 1–2.

¹³¹ Charles Tilly, ‘Introduction,’ in Charles Tilly ed., *The Formation of National States in Western Europe* (Princeton: Princeton University Press, 1975): 44.

¹³² Deutsch (33). From the 1970s onward, modernization was subject to criticism from several angles. The most widely known being the attack from multiculturalism that accused both the nation state and modernization for causing injustice to ethno national minorities in the name of nation building. Wimmer (n 11): 4.

part of the left argued that the new transnational order (post nationalism) with its impact on nation states would put an end to all nationalisms, for example, through the European Union that gave birth to multiple identities.¹³³ Ethno nationalism (tribalism being its pejorative name) is invariably cited as the source of political instability that has undermined modern government in Africa. As a result, almost all post-colonial African leaders employed several ideologies to ensure homogeneity in their respective countries.¹³⁴ Yet, in the former USSR and Yugoslavia contrary to the predictions, it outlived socialism and may have contributed to their demise. Even in the west, we are witnessing the rise of populist and identity based movements gaining support more than main stream political parties from the right and the left.¹³⁵ The European Union, giant confederal regional institution meant to check the ugly consequences of the two World Wars related to nationalism faced Brexit.¹³⁶

Yet, with few exceptions, the nation state rarely resulted in homogeneous nation states. In Africa this is even more problematic as there has not been a core nation in the process. Colonialism brought different communities and that were arbitrarily divided in different states. The reality today is most states are diverse and experts have since the 1960s shifted their analysis from nation building that forces non-core groups to assimilate to managing diversity that allows unity and yet has space for diversity. Thus who were coerced to assimilate into the dominant nation would at later stage resent the process and force the nation state into a new social contract, most of it conducted in the 1960s and subsequent years in the name of minority rights, multiculturalism, indigenous people's rights etc. Coercion worked only at the *formative* stage. Once the empire or the nation state is created, there is always the need to revisit the social contract to change the coercive process of nation building to a *democratic* one. Force cannot ensure the continuity of the state and its territory, consent

¹³³ See John McGarry et al. (130): 4.

¹³⁴ John Markakis, 'The Crisis of the State in the Horn of Africa,' in John Markakis, Gunther Schlee and John Young, eds., *The Nation State: A Wrong Model for the Horn of Africa* (Max Planck: 2021): 13.

¹³⁵ Ghia Nordia, 'The End of the Postnational Illusion,' *Journal of Democracy* 28:2 (2017); Francis Fukuyama, *Identity: The Demand for Dignity and the Politics of Resentment* (Farrar, Straus and Giroux, 2018); Amy Chua, *Political Tribes: Group Instinct and the Fate of Nations* (New York: Penguin Press, 2018).

¹³⁶ Grotenhuis (n 13): 104.

of the governed could, if combined with other right political framework, institutions and policies. Unhappy groups often want to break the chain imposed on them and we are aware of the tension between those who want to keep the state as created by the coercive process and those who feel suffocated by it. Most European nation states have democratized the state and since the 1960s have opened up, albeit painfully, the nation state to allow sub units to enjoy political autonomy. Spain (Catalan), UK (Scotland and Northern Ireland), Belgium (for the Flemish), Canada (its French speaking part) are prime examples that amended their constitutions to accommodate left outs during the nation building process. One needs to note that it is a two-step process. Democratizing the nation state by *revising the social contract* and by detaching it from coercive process of nation building, then followed by autonomy to politically mobilized groups in the form of devolution, federation or political autonomy with or without power sharing at the center.¹³⁷

Another feature of the nation state was its link with centralization. The first powerful nation-states were monarchies, advocates of the divine right of kings to protect central authority and power. The main ideologues of such absolute centralization included people like Hobbes, Jean Bodin and Spinoza.¹³⁸ Divine Right to rule was later replaced by popular sovereignty and consent following the several revolutions in Europe but that did not change the centralized nature of the nation state. It took centuries of contentious struggle and even war to open up the nation state to allow ethno national groups exercise autonomy.

The nation state has also strong link with individual citizenship. Modernization theory and liberalism remained its foundations. The concept of citizenship, based on the rights and duties of the individual, became central to membership in the political community constituted by the nation state. As it excluded other sub units¹³⁹ outside of the dominant

¹³⁷ Loughlin (n 8). Spain's national government banned Catalan's right to self-determination and jailed its leaders in 2017. The UK is in dilemma as to whether Scotland can do a second referendum on self-determination and thus there are some paradoxes and regression in the west (see Chapter 2).

¹³⁸ Thomas Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Inquiry* (Toronto: University of Toronto Press, 2015): 76.

¹³⁹ The Virginia Declaration of the Rights of Man ignored not only women, but also slaves and aboriginal people; as did the Philadelphia Convention (where slaves were acknowledged only in determining the size of representation of states in the Senate, for which they did not themselves vote—and were deemed as the property of others).

nation, its legitimacy was based on the consent of the individual.¹⁴⁰ With the emergence of the notion of human rights and democracy, members of excluded or marginalized communities were given the right to citizenship. This did not imply the political incorporation of these communities, as such; instead *citizenship became a means towards their assimilation* in the wider political community. Melting pot was the metaphor for the process of assimilation. This process was then subject to criticism and there was a slow progress towards integration and soft multiculturalism that leaves diversity to the private sphere. In the civil or private domain, communities may organize their own social, religious, educational and economic life. They may converse with others in their own language, and may cultivate cultural and social links with members of their own ethnic or kin communities through vernacular newspapers, visits and other exchanges. In public, sub units were required to conform to uniformity set by the dominant nation and majoritarian democracy to the extent that both existed. This notion was later attacked based on minority rights resulting in revision of several western constitutions to allow political autonomy and representation to their cleavages. The new liberals such as Kymlicka wrote about multiculturalism and how it can extend to address group based demands.¹⁴¹ Liberal multiculturalism¹⁴² was advocated as norm and with it came the ‘salad bowl’ metaphor. In the salad bowl, the different ingredients of the salad are colorfully seen and states were supposed to promote pluralism (different identities) in society. Yet multiculturalism was criticized because it did not promote intergroup interaction in society. In some cases multiculturalism created parallel societies in a state with little or no interaction among them. A new thinking under the banner of inter-culturalism¹⁴³ emerged to supplement multiculturalism focusing on intergroup interaction, dialogue and values that cut across divides. Some refer to inter-culturalism as ‘public park’¹⁴⁴

¹⁴⁰ Daniel Elazar, *Federalism and the Way to Peace* (Ontario: Queen’s University, 1994): 4.

¹⁴¹ Kymlicka (n 8).

¹⁴² Will Kymlicka, *Multiculturalism: Success, Failure and the Future* (Migration Policy Institute, 2012).

¹⁴³ Nasar Meer and Tariq Modood, ‘How does Interculturalism Contrast with Multiculturalism,’ *Journal of Intercultural Studies* 33:2 (2012): 175–196.

¹⁴⁴ Yascha Mounk, *The Great Experiment: Why Diverse Democracies Fall Apart and How They Can Endure* (New York: Penguin Press, 2022).

model. Yet inter-culturalism or public park metaphor at times falls short of addressing the core reasons for ethno national mobilization: political and economic injustice in the hands of the titular nation. Such debates were often framed in relation to immigrants and had little contribution to rights of ethno national minorities.¹⁴⁵

The nation state as a model has influenced several continents across the globe, had serious impact on Africa. African leaders borrowed modernization theory as a main theory of polity building that in effect meant transplanting the western nation state to Africa.¹⁴⁶ That meant the post-colonial African states adopt democratic, capitalist, and individualist based political institutions. The theory assumed nation building as a challenge that arose wherever modernity brought previously smaller and self-contained social units into closer contact with each other. In Africa following the end of colonialism, it was the inspiring ideology for many ‘big men’ nation builders that faced the enormous challenge coming from loosely integrated diversity abandoned by colonialism in a context of artificially drawn borders that hardly reflected the living realities. Leaders thought the homogenization of the nation and its state came to be seen as an indispensable prerequisite for democracy, political stability and modernization. The motto was ‘kill the tribe to build the nation.’¹⁴⁷ Some centrist nation builders like Syad Barre of Somalia even went to kill a person that he thought symbolized clanism and buried him in public signaling the end of clanism in Somalia only to get life after his removal from power in 1991.¹⁴⁸ This reminds us of the prominent article by Walker Connor, who long time ago warned ‘Nation Building could be Nation Destroying’¹⁴⁹ He argued, and this was at the time

¹⁴⁵ See Steven Vertovec and Susanne Wessendorf eds., *The Multicultural Backlash* (London: Routledge, 2020). The book’s main focus is with immigrants and issues of integration and there is the view that immigrants cannot have rights that parallel ethno national minorities. Whether this remains an appropriate solution to immigrants is something that time will tell but most of the debate refers to immigrants.

¹⁴⁶ Wimmer (n 11): 3.

¹⁴⁷ A slogan of Mozambique Liberation Front quoted in Solomon Ayele Derso, *Taking Ethno Cultural Diversity seriously in Constitutional Design: A Theory of Minority Rights for Addressing Africa’s Multiethnic Challenge* (Leiden and Boston: Martinus Nijhoff Publishers, 2012): 67.

¹⁴⁸ Christopher Clapham, *The Horn of Africa: State Formation and Decay* (London: Hurst and Company, 2017): 56.

¹⁴⁹ Connor (n 9): 319–355.

when the nation building as a homogenizing concept was at its peak, that modernization, industrialization, respect for individual rights do not necessarily minimize ethnic loyalty and nation building may in the end be nation destroying in diverse societies. While demands of ethno national minorities and the attendant theory of nationalism may have destructive implications when pushed to its extreme as witnessed in the two World Wars, former Yugoslavia after the end of the Cold War and Rwanda (1994), the thinking that it will fade away seems far from reality. On the contrary, what we see is resurgence and hence the need for managing and accommodating it.¹⁵⁰

1.4.2 *The Nation State Promotes the Titular Nation's Interest and Values*

We already noted the role of the core nation and how it has been used to assimilate or integrate non-core groups. This would imply that institutions and values set and promoted are reflective of the interests and values of the core nation. Kymlicka wrote 'ethnic minorities have not fared well...under the nation state. Various policies of assimilation and exclusion have been directed at minorities in the name of constructing homogenous nation states.'¹⁵¹ Yet we know the reality that many states are diverse. There is tension between a *de facto* cultural, ethno national and religious diversity challenging the *de jure* model of cultural unity of the nation state. In the context of diverse societies the dilemma and limitations of the nation state are clear. Over the last three decades the nation state has been subject to various critiques. For example Will Kymlicka argued the state as a possession of a dominant national group (titular nation) that uses the nation state and public policy instruments such as media, history, education and language policy etc. as a mask for the ruling elite to keep power, resources and nurture its privileged identity and status. The nation state claims to treat all citizens as *equal* members of the nation, remains a disguise for the tyranny of the titular nation. The idea of benign neglect of minority cultures and the notion of separation of state and ethnicity is *false* as it's values (language, culture, institutions and history etc.) are rooted in the

¹⁵⁰ See John McGarry et al. (n 130): 5.

¹⁵¹ Kymlicka (n 8): 5.

titular nation.¹⁵² This state of fact was to serve as a trigger for the birth of ethno national/identity based political movements.

That the nation state was a strange anomaly in divided societies was of course identified long time ago by John Stuart Mill. He wrote, 'Free institutions are next to impossible in a country made up of different nationalities...Among people without fellow-feeling, especially if they speak different languages, the united public opinion, necessary to the working of representative government cannot exist.'¹⁵³ One needs to only qualify Mill's sharp observation by stating that the problem is more acute in countries with deep divisions. Ephraim also identifies the constitutive 'deficiency of the nation state.' When two or more national communities reside in the same territorial space...popular national sovereignty and territorial national self-determination become zero sum game. The gain of one is unavoidably the loss of the other. For this reason ethno national conflicts in mixed areas are bloody, extremely violent and protracted, for full victory and nation state for one means the expulsion or destruction of the other.¹⁵⁴ The liberal nation state in its initial phase knows only of two units: the sovereignty of the state and of the individual citizen and makes impossible mechanism of representation of different ethno national minorities which are left at the mercy of governmental institutions and bureaucracies under the command of the titular ethno national majority and hence the argument that nation state has democratic deficit. In short, *the nation state is oppressive to outsiders of the dominant/titular national group* and remains a disguise for the tyranny of the titular nation. It has democratic deficit to the extent that it does not address demands of ethno national minorities. While some are tempted to argue in favor of ensuring the right to equality and allowing minorities to exercise three D's (dish, dance, dress) to address some of the issues, at the core of ethno national minority rights is political exclusion resulting in other forms of exclusions: economic injustice as well as identity and value marginalization. At the center of minority rights is ensuring political, economic justice and allowing space for recognition and accommodation of identity. The three

¹⁵² Ibid.: 61–62.

¹⁵³ John Stuart Mill, 'Considerations of Representative Government,' in H.B. Action ed., *Utilitarianism, on Liberty and Considerations on Representative Government* (London: J. M. Dent and Sons, 1976): 187–428. Ephraim, *supra* (2015): 63–65.

¹⁵⁴ Ephraim (n 116): 63–65.

D's are thus an obliterated form of interpreting ethno national minority rights.¹⁵⁵

As rightly depicted by Michael Keating, in divided societies there are 'so many nations, but few states.'¹⁵⁶ It is now clear that there exists 'conspicuous discrepancy between the nation and the political borders of states in which there are close to two hundred states all of whom together contain 3,000 to 5,000 nations in which there exist at least six hundred potential nation states, a mismatch that at times leads to tension and conflicts between those who would like to exercise self-rule and those resisting it.'¹⁵⁷ The Horn of Africa being a prime example in which the contradiction between state led and ethno national based mobilization takes acute form. The many sided conflicts in the Horn involved rival nation state building projects fought in a zero sum game, where one's gain is another's loss. The state, actual or imagined, was the prize in the manifold conflict, with the centrist elite's seeking to preserve and expand existing states, sub state entities trying to secede and create their own states, irredentists yet fighting to secede from one state in order to join another, and others still to capture power within their own state. Markakis, Young and Schlee argue.

The many sided conflict is fought under the banner of nationalism, involving several rival nation state building projects—Ethiopia, Eritrea, Sudan, South Sudan, Somalia, Somaliland, and Djibouti—working at cross purposes in a zero sum game. In the process thus far, the map of the region has been revised several times; two states were truncated and one collapsed, ending with a faithful restoration of the colonial map. At present, all the states face challenges to their sovereignty, identity, and territory. None has exercised effective control over its entire territory, secured its borders,

¹⁵⁵ Kymlicka (n 8).

¹⁵⁶ Michael Keating, 'So Many Nations, So Few States: Territory and Nationalism in the Global Era,' in Alain-G. Gagnon and James Tully eds., *Multinational Democracies* (Cambridge: Cambridge University Press, 2001): 39.

¹⁵⁷ See Alesina, Alberto F. and Easterly, William and Devleeschauwer, Arnaud and Kurlat, Sergio and Wacziarg, Romain T., Fractionalization (June 2002). Available at SSRN: <https://ssrn.com/abstract=319762> or <http://dx.doi.org/10.2139/ssrn.319762>; See also Ephraim Nimni, 'Introduction: The National Cultural Autonomy Model Revisited,' in Ephraim Nimni ed., *National Cultural Autonomy and Its Contemporary Critics* (London: Routledge, 2005): 1.

possessed a monopoly over the use and instruments of force, enjoyed legitimacy and loyalty from a majority of the sub units that challenge the center, enforced law and maintained order throughout its domain, or protected the lives and liberty of its subjects.¹⁵⁸

To date the struggle to revise the map in this region has gone through two major phases. The first phase, a typical of the African leaders in the 1960s, brought the consolidation of state units created by imperialism: Ethiopia, Sudan and Somalia annexing territories (Eritrea, South Sudan and Somaliland), and the second saw the reversal of the process of consolidation after the end of the Cold War. The first phase reduced the number of states in the Horn from seven to four after Eritrea, South Sudan and Somaliland were annexed.

The second phase saw the fragmentation of Ethiopia, Sudan, and Somalia with the secession of the three annexed units: Eritrea, southern Sudan and Somaliland *de facto*, increasing the number of states to seven. In the second phase, it was caused by insurgents (ethno national and regional ones) challenging the state led nationalism. The effect being the full restoration of the colonial map after decades of violent conflict took the lives of millions, dislocated the region's economy, and undermined its prospects for development. It also condemned its people to live under authoritarian rulers addicted to the use of force as the main instrument of government and polity building. The two phases demonstrate a head on clash between state led nationalism on one hand and ethno nation or regional based nationalism on the other, a clash of nationalism so to speak. Unsurprisingly, since the state led nationalism/nation building was chosen by the ruling elite, the projected nation's identity was to be the same as with the ruling elite's narrow identity. National integration, therefore, became a political imperative.¹⁵⁹ This required the dissolution of quasi autonomous kingdoms and traditional systems of sociopolitical organization and of ethnic identities, as well as the effacement of ethnic languages and replacement by the identity, culture, tradition, and language of the nation state builders. This was followed by national integration, that is the chosen identity being diffused throughout the state

¹⁵⁸ Markakis, Schlee and Young, 'Introduction' (n 103): 15.

¹⁵⁹ Markakis (n 134): 21.

via a process of acculturation, assimilation, and if need be, forced conversion.¹⁶⁰ The result as indicated above is endless war and the making and un making of state boundaries certainly at a heavy cost. In the context of diverse countries with deep divisions, this calls for a more inclusive governance system that provides space for non-titular minorities to exercise political autonomy, share power at the center and enjoy cultural/language based autonomy, short of fragmentation.

The growing interest in the protection of ethno national minorities outside of the titular nation that controlled the state is largely explained by the need to ensure peace and security, reducing conflict through inclusive government. It is about reducing global, regional and local conflicts that arise from political, economic and identity based injustices. After the collapse of Communism in many countries, third wave of democracy did not as promised bring liberal democracy to triumph but was instead followed by wave of inter group conflicts in the Balkans, the Caucasus and many parts of Africa including the genocide in Rwanda and recently in Ethiopia (2020–2022), state failure in Somalia and the opening of political space for terrorists and mass refugee flows and thus becoming threat to international and regional peace and security.¹⁶¹ Reduction of poverty and under development that comes with marginalization of ethno national minorities, shift from individual rights to ethno national minorities in the discourse on human rights particularly in divided societies and more importantly enhanced democratization that goes beyond majority rule through proportional electoral systems and power sharing schemes emerged on the menu of options.¹⁶² Threats coming from ethno national minorities are not restricted to specific geographic zone but remain in the words of Walker Connor ‘truly universal’ challenging both developed (for example Belgium, Canada, Spain and United Kingdom) and many developing countries albeit to varying degrees.¹⁶³

The toughest critique of the nation state comes from territorially based and politically mobilized ethno national groups; the following section summarizes the main points.

¹⁶⁰ Ibid.: 21.

¹⁶¹ See Kymlicka (n 8): 48–49.

¹⁶² Ibid.: 45–47.

¹⁶³ See Connor (n 9).

1.4.3 *Cleavages and the Nation State*

The other limitation of the nation state is the fact that it is antithesis to politically mobilized cleavages. Perhaps this is where one observes a head on clash between state led nationalism vs. sub national ethno nationalism or regionalism more visibly. Politically mobilized cleavages continue to threaten the nation state. Following the end of the Cold War, such cleavages caused what Arend Lijphart dubs a ‘wave of ethnic conflicts,’¹⁶⁴ instead of the promised ‘third wave of democracy.’¹⁶⁵ Mobilized ethno national minorities are ‘regionally concentrated ethnic groups who once enjoyed or aim to enjoy political autonomy and have become part of states in which they constitute an ethnic minority through conquest, annexation, colonization or incorporation during the coercive process of nation building.’¹⁶⁶ They mobilize politically around assertions of national identity and self-determination. The goal of such mobilization is to recover the extensive self-government they claim to have enjoyed historically or they aspire to have now. The degree of self-government they seek ranges from autonomy, national self-government to independent statehood. Countries that have politically mobilized ethno national groups cannot assume to have stable territory. The demands of such groups are framed and entrenched in relation to a particular territory over which they aim to exercise self-government and the very existence of *the unity and territorial integrity* of the state is put to test.¹⁶⁷ We noted already how the map in the Horn has been made and unmade in the last decades.

Ethno national based mobilisation is a very potent force that, if not managed carefully could result in fragmentation. It has resulted in the formation of some twenty seven states that have joined the United Nations following the end of the Cold War.¹⁶⁸ Contrary to several predictions of its demise, it has survived and at times threatened nation states. Experts have challenged the effort to eradicate sub state nationalism as

¹⁶⁴ Arend Lijphart, ‘The Wave of Power Sharing Democracy,’ in Andrew Reynolds ed., *The Architecture of Democracy: Constitutional Design, Conflict Management and Democracy* (New York: Oxford University Press, 2002): 37.

¹⁶⁵ Huntington (n 42).

¹⁶⁶ Ted Robert Gurr, *Minorities at Risk: A Global View of Ethnopolitical Conflict* (Washington: United States Institute of Peace Press, 1993): 18–20.

¹⁶⁷ Anderson and Choudhry (n 28): 374.

¹⁶⁸ See Stepan, Linz and Yadiv (n 13): 9, 14.

‘post national illusion’¹⁶⁹ and counselled actors to properly understand this force and to design appropriate institutions and policies to manage it. Territorially based and politically mobilized cleavages continue to challenge the process of nation building both in the developed (Canada, Spain, Belgium, United Kingdom) and the developing world. The countries discussed in Chapter 4 (Nigeria, Ethiopia, South Africa and Kenya), despite differences in the degree of mobilization, all continue to face challenges related to group based cleavages.

According to Horowitz, divided societies refer to cases in which identity-based politics have a high degree of salience exceeding that accorded to alternative forms of political mobilization such as ideology, class, and gender, and the relationship between groups is affected by deep levels of mistrust and antagonism, making it less cooperative.¹⁷⁰ As argued by Sujit Choudhry ‘a divided society is not merely a society which is ethnically, linguistically, religiously or culturally diverse....it is hard to imagine a state today that is not diverse.’¹⁷¹ What makes a society divided is when the differences are politically salient and an identity based distinct group uses it as basis for political mobilization. As such identity becomes the prime source of political mobilization around which political claims for recognition, resource control, accommodation, and self-government are framed, political parties formed, elections contested and governments composed.¹⁷² These forces affect the process of constitution making and constitutional design. A distinct identity based political mobilization demands for a more autonomous self-government. The nation is famously defined as a community that shares common identity and claims

¹⁶⁹ Nordia (n 135).

¹⁷⁰ See Donald Horowitz, *Constitutional Design: Proposals, Process*, in Andrew Reynolds ed., *The Architecture of Democracy: Constitutional Design, Conflict Management and Democracy* (New York: Oxford University Press, 2002).

¹⁷¹ Choudhry (n 35): 5.

¹⁷² Anderson and Choudhry (n 28): 374.

a particular territory, believes in *belonging together*¹⁷³ and wants to determine its political destiny through a concerted political action directed at self-government and possibly statehood. The nation's main goal is self-government and statehood and that serves a basis for *political action* linking the elite and the masses. Less mobilized groups and countries that are not deeply divided could be managed through integration and other softer options.¹⁷⁴

As a result of cleavage, deeply divided countries, continue to face a threat of fragmentation, albeit to varying degrees. Ethiopia lost Eritrea and the threat of secession is still a problem as it harbours many national liberation movements such as the Oromo, the Ogaden/Somali, and the Tigray among others. Some ten ethno national groups that used to administer themselves at local government level in the South have following the winds of change in 2018 demanded a constituent unit status and four new states have already been established increasing the number of states from nine to thirteen. The war between the federal government and Tigray although has multiple causes is very much related to Tigray's age old demand for genuine self-government¹⁷⁵ and fair representation in federal institutions. Ethno national groups are thus demanding more, not less even after two and half decades of federal practise.

Nigeria's split between north–south, Muslim-Christian remains visible in particular during presidential elections. The split is kept at delicate balance based on an unwritten convention that guides presidential elections to commonly rotate the office of the president between the north and south.¹⁷⁶ Nigeria faced secession threat from Biafra towards the end of the 1960s and Igbo nationalism has not withered away. There is also an insurgent group in the Niger Delta (Ijaw) that claims for self-government

¹⁷³ See David Miller, *On Nationality* (Oxford: Clarendon Press, 1997): 17–18; Walker Connor, 'A Nation is a Nation, is a State, is an Ethnic Group, is a...' in John Hutchinson and Anthony Smith eds., *Nationalism* (Oxford: Oxford University Press, 1994) p.36. There are objective and subjective elements of the definition and both Miller and Connor focus on the subjective than the objective (common culture, language, religion, territory or political institutions) elements. The nation exists in the hearts of the members and is manifested in the sense of *belonging together*.

¹⁷⁴ Watts (n 26): 84.

¹⁷⁵ See for details Assefa Fiseha, 'Tigray: A Nation in Search of Statehood,' *International Journal of Minority and Group Rights* (2023).

¹⁷⁶ Peter Lewis, Darren Kew, 'Nigeria's Hopeful Election,' *Journal of Democracy* 26:3 (2015).

and local control of resources. In reaction to extremely centralized federation and suppressed marginalization during the military era, a demand for 'true federalism,' that grants genuine political autonomy and resource control is now fully expressed by ethno regional groups (Yoruba, Igbo, Niger Delta region) in Nigeria.¹⁷⁷

South Africa has cleavages based on race, language and class. It faces Zulu nationalism that over the years, seem to be diluted both because of lack of internal cohesion and as a result of the African National Congress's (ANC's) penetration in its social base through a democratic process. Kenya has its North East Frontier Somali problem and the rift valley region where ethnic conflicts have erupted on several occasions, in addition to the Indian Ocean coastal region where there is strong demand for self-rule.¹⁷⁸ Ethnic rivalry for controlling the overbearing presidency in a winner-take-all politics resulted in ethnic conflicts in 2007 and subsequent elections and continues to divide Kenyans along ethnic lines.

A precaution is in order here. First, cleavages do not automatically translate into a political project. Political and economic injustice that is reinforced by deep cleavages, elites that frame the issues, and state response or the lack thereof play their own roles in the process of transformation. As argued by Anderson and Choudhry, cleavage or diversity could remain as an anthropological fact having little or no political implications. Identity based mobilization for a political aim is the essence that shows transformation of the nature of identity from an anthropological fact to a political mission. It needs agency- political entrepreneurs that read into the political dynamics of the country and frame the issues in a way that appeals to their audience. These political entrepreneurs are critical in 'framing of narratives,'¹⁷⁹ articulating perceived or real exclusion and subjugation. 'Political entrepreneurs are critical to the success of political mobilization by framing the case (of ethno nationalism), developing strategies, and marshalling resources.'¹⁸⁰ They articulate alternative

¹⁷⁷ D. Babalola, 'Nigeria: A Federation in Search of Federalism,' *50 Shades of Federalism* (2017).

¹⁷⁸ Following the 2017 Presidential election controversy, the Coastal region Governor of Mombasa Ali Hassan Joho supporting Raila Odinga's cause called for the secession of Coastal region from Kenya. See 'Coastal Leaders Renew Plot for New Political Party after Secession Talk,' *Standard Digital*, February 18, 2018.

¹⁷⁹ Anderson and Choudhry (n 28): 383.

¹⁸⁰ *Ibid.*: 382.

narratives that seek to deconstruct any centrist narrative about the past, present and the future (fears and possible hopes) addressing the grievances and the entitlements of the population they claim to represent including territorial entitlements. Through that an ideology is framed and a plan set for concrete action. These way ethno national based cleavages confront the nation state and if peaceful political solution is not on the menu, conflict, war, and secession are the results.

1.4.3.1 *Links with State Policy and Legitimacy of Institutions*

Ted Gurr argues that conflict between competing nationalisms typically escalates in stages and it is here that one finds direct link with state policy.¹⁸¹ Eritrea's secessionist elite demand in the mid-1980s was limited to restoration of the federation (1952–1962) that was unilaterally abolished by Emperor Haile Selassie in 1962. With the military regime's failure to respond and its insistence on violence as means to quash it, radical issues such as secession emerged. Thus, cleavages often start with non-violent modest demands and, when regimes fail to respond, evolve into violent protest and finally to rebellion. The 'escalation occurs through a pattern of demands and responses: non-violent protest is met with a lack of political responsiveness, which in turn leads to violent protest, which is met with a violent reaction, and which then leads to rebellion and an armed conflict and civil war.' We noted already the political framework and public policy are deployed by the state to create 'homogenous nation state' during the heydays of the nation state and that has sparked counter ethno nationalism. State policy and action or inaction is thus a major factor that can escalate or moderate ethno nationalism. We noted how in Sudan vs. South Sudan contrasting visions of the nation state (also in Ethiopia) led to legitimacy crisis and secession of South Sudan in 2011.

The process of transformation from a diversity as an anthropological fact to a political project is therefore heavily associated with the imposed nation building project pursued by the central government against rival ethno national and regional groups. *Left outs* from the process design a defensive response to central state led project of nation building.¹⁸² In other words, ethno national based cleavage and political mobilization

¹⁸¹ Ted Robert Gurr (n 166): 18–20.

¹⁸² Anderson and Choudry (n 28): 381.

is often a reaction to centrist elite's project and a search for finding a political and identity space.¹⁸³ It is a sub state nationalism framed in reaction to the central government's nationalism. There are thus competing nationalisms within the nation state that if not addressed could lead to violence, civil war and state fragmentation. Both are pursued in the name of nationalism and have the potential to fuel the passions and emotions from both sides of the political spectrum to cause political instability and state collapse. This one may call is a clash of nationalism, one pursued by the central government in the name of nation building, patriotism, civic nationalism, unity, ensuring territorial integrity and the other by the ethno nationalist elite aiming self-government, representation and possibly secession.

The civil war in Ethiopia (1974–1991) fits well into the above framework. The centrist military regime fought the ethno national based liberation fronts in the name of *Ethiopia Tikdem* (Ethiopia First) and ensuring the territorial integrity of the country while branding them as secessionists. As observed during the military rule (1974–1991) and in the war in Tigray (2020–2022), 'Ethiopia first' has tendency to turn into fascist nationalism in the name of 'unity and territorial integrity:' pre-modern style state sponsored societal violence becomes the outcome. In two years more than one million people have perished.¹⁸⁴ The ethno nationalist elite frames the centralized nation state as a mask for the centrist elite's culture, language, religion to become the national culture, language or religion.¹⁸⁵ In other words, the group, however narrow its base, which controls the state uses it not only to marginalize others from power and resources but also uses state institutions and policies to 'promote, consolidate and create a privileged position with respect to its identity and its manifestations. The state is defined as the expression of the group's nationhood.'¹⁸⁶ Ethno national and regional forces counter

¹⁸³ Lars-Erik Cederman, Andreas Wimmer and Brian Min, 'Why Do Ethnic Groups Rebel? New Data and Analysis,' *World Politics* 62:1 (2010): 87.

¹⁸⁴ According to some sources Abiy's recent war has caused death to millions of people in Ethiopia and though much is talked about Ukraine, Tigray's war remains world's largest one. See Mark Green, 'Ukraine Understandably the Focus, but Ethiopia's Tigray Conflict is World's Largest,' available at <https://www.wilsoncenter.org/blog-post/ukraine-understandably-focus-ethiopias-tigray-conflict-worlds-largest>, October 25, 2022.

¹⁸⁵ Kymlicka (n 8): 61–63.

¹⁸⁶ Ibid.: 62.

the state led nationalism demonstrating both its narrow and exclusive bases and designing alternative narratives leading to deadly conflicts. The non-material aspects of conflict such as the search for dignity and collective self-esteem,¹⁸⁷ rich history ('we were great and we want to be great again'), and claims by ethno nationalist groups to regain lost social status (dignity) in response to historical traumas on their identity fuel the political and resource conflict.¹⁸⁸ As Connor pointed, 'Men do not allow themselves to be killed for their interests; they allow themselves to be killed for their passions.'¹⁸⁹ It is not surprising then that the *legitimacy of the government, its institutions* and the values upon which it is established remain one of the sources of tension and at times the cause of its terminal crisis.

1.4.4 Democratic Deficit

There is some discussion about Ethiopia as case of 'transition.' Transition from authoritarianism to democracy is not a linear path and is vastly complicated process. The concept of 'transition' itself is contested one and is less predictable. In the literature on transition, revolution and external impositions are sometimes mentioned as possible factors facilitating transition to democracy but both remain contradicted by facts on the ground. A revolution in France brought an end to old regime but democracy in France thrived and consolidated only after the Second World War. In between France went through several ups and downs. Besides the Arab Spring that was hoped to bring democracy to the Arab world and North Africa turned to Arab Winter. Ethiopia's popular 1974 Revolution was hijacked and turned to brutal military rule, nor has Sudan's revolution in 2019 brought democratic transition as the military-cum security apparatus of the old regime slowly crept to power back. Allied Forces imposed democracy on Japan and Germany that later consolidated in both countries but similar effort in Iraq and Afghanistan faltered. Besides, the ousting of an authoritarian regime or its collapse and holding routine

¹⁸⁷ Walker Connor, *Ethno Nationalism: The Quest for Understanding* (Princeton, NJ, 1994).

¹⁸⁸ Francis Fukuyama, *Identity: the Demand for Dignity and the Politics of Resentment* (Farrar, Straus and Giroux, 2018); Kymlicka (n 8): 81; Horowitz, *Ethnic Groups in Conflict* (Berkeley: University of California Press, 1985): 131–134.

¹⁸⁹ Connor (n 187): 206.

elections does not automatically translate to democracy. In the worst cases and as it happened in Ethiopia several times, it may end up only changing an old master by a new one, sometimes the new master becoming worse than its predecessor. Since the post-1990s, following the much discussed transition in South Africa that brought an end to white minority rule, negotiated transition, also called political settlement has emerged as a new alternative path to democracy. The South African experience went through several crucial steps. The main political parties, all unelected, established an inclusive interim government and an interim constitution following a dialogue. During the next step, an elected Constitutional Assembly (CA) drafted the final constitution. The mandate of the CA was however subject to key Constitutional Principles such as devolution, bill of rights, judicial review and state representation in the second chamber as agreed in the dialogue among the main parties. The Constitutional Court was then mandated to check whether the new constitution complies with the Constitutional Principles as set out in the dialogue and certify it as a final step.

There is strong link between democracy and federalism although both concepts have their own focus. As the evidence from most working and healthy federations show, such federations are also democratic. Federalism establishes multiple center of power allowing citizens and other sections of society to participate and influence decision making as well as to ensure accountability. In this sense federalism and democracy reinforce one another. Yet as demonstrated in Chapters 3 and 4, federalism limits the dangers of majority tyranny to some degree, very essential in deeply divided societies. The special representation of states in second chambers, the power sharing scheme and consensus based decision making in federal institutions serve as safeguards limiting the risks of majority tyranny and in this sense federalism constrains majoritarian democracy somehow. The rigid amendment procedure that requires some level of engagement with constituent units in addition to federal legislative bodies also demonstrate federalism limits majority rule and aims to ensure minority rights. Yet, there are also federations that are not democratic and in many cases remain sham. Ethiopia belongs to this camp: authoritarianism and tyranny of the center threaten the system. There is no federalism in one authoritarian party rule. As shown in Chapter 4 even by comparison with Nigeria and Kenya, Ethiopia lags behind by all indicators of democracy.

While democracy within the African continent remains fragile with a few exceptions, working majoritarian based democracy in deeply divided

societies could generate problems, necessitating the need for other more inclusive options. Until deconstructed by Arend Lijphart (consociational democracy) and consistent with the concept of nation state, the dominant view simply reinforced majoritarian democracy anchored on the *core nation*: ‘the functioning of democracy requires linguistically unified *demos*. Significantly, this does not mean that all citizens must have the same first language to make democracy work, but merely that they generally have sufficient knowledge of one language in which communication can typically proceed with ease.’¹⁹⁰ Joseph Lacey calls this the *lingua franca* thesis¹⁹¹ and has also been advocated by Robert Dahl where he considered homogeneity as precondition for stable democracy.¹⁹² Multilingualism is feared as it may result in different public spheres, varying opinion and identity formations. This may lead to linguistically demarcated political mobilization and fragmentation. Theories on multinational democracy however see this argument with skepticism and counter it demonstrating that majoritarian democracy is ill suited for deeply divided societies and thus suggest consociational democracy. In many cases as in Africa (for example, Ethiopia, Kenya, South Africa and Nigeria), the *core nation does not exist* and thus make majoritarian democracy lack a major foundation for it to function. At an empirical level as well Belgium, India, Switzerland and Canada are democracies that counter the *lingua franca* thesis. Nor does homogeneity ensure stability and democracy, Somalia being the classic case.

<i>Ethiopia:</i> <i>ethnic group</i>	%	<i>Nigeria: ethnic</i> <i>group</i>	%	<i>Kenya: ethnic</i> <i>group</i>	%	<i>South Africa:</i> <i>ethnic G</i>	%
Oromo	34.4	Hausa-Fulani	29	Kikuyu	22	Zulu	23.8
Amhara	27	Yoruba	21	Luhya	14	Xhosa	18
Somali	6.2	Igbo	18	Luo	13	Sepedi	9.1
Tigray	6.1	Ijaw	10	Kalenjin	12	Setswana	8
Sidama	4	Kanuri	4	Kambat	11	Sesotho	7.6
Guraghe	2.5	Ibibio	3.5			Xitsonga	4.5

(continued)

¹⁹⁰ Joseph Lacey, *Centripetal Democracy* (Oxford: Oxford University Press, 2017): 3; the idea originally belongs to Philippe Van Parijs, *Linguistic Justice for Europe and the World* (Oxford: Oxford University Press, 2011): 28–30.

¹⁹¹ Lacey (n 190): 5.

¹⁹² Robert Dahl, *Toward Democracy—A Journey, Reflections: 1940–1997* (Berkeley: Institute of Government Study Press, 1997).

(continued)

<i>Ethiopia: ethnic group</i>	%	<i>Nigeria: ethnic group</i>	%	<i>Kenya: ethnic group</i>	%	<i>South Africa: ethnic G</i>	%
Wolayta	2.3	Tiv	2.5			Afrikaans	13.5
Afar	1.7					North Sotho	9.1

Note None of the groups taken alone commands 50% majority and that brings host of issues. In most of the countries where multiethnic, multinational federations are theorized (Canada, Spain, UK- asymmetric decentralization), there is core nation challenged by regional and ethno national forces.

Besides while individuals may manifest layers of overlapping identities, it happens that as a result of deep divides, one form of identity becomes more visible than others. While there is wide support for federalism in Ethiopia, out of 2,400 sample composed of different ethnic and religious groups, 48% support the existing constituent unit arrangement while 49% disagree. Some 17% of Ethiopians said they identify themselves more with their ethnic identity than the overarching (Ethiopian) identity; 42% identify themselves both as Ethiopian and a particular ethnic identity; 7.2% manifest themselves more Ethiopian than a particular ethnic identity; 20.9% said they identify themselves as Ethiopian only; a few ones (3.6) did not know how they identify themselves.¹⁹³

This is an area where institutional design for democracy matters a lot. How do we ensure a legitimate and inclusive government when different minority ethno national groups compete for power? This is particularly acute and could lead to deadly conflicts as the drivers of the central government version of nationalism are not a majority. In many cases, as in the four case studies, there is no dominant ethno national group that enjoys a demographic majority and could claim to have democratic majority to pursue its goals. It becomes a clash between a minority that has state resources at its disposal trying to impose its will on other minorities. Yet even if the central government's project of nationalism enjoys a majority, it pits a permanent majority against a permanent minority with no hope of becoming a majority. Arend Lijphart brought this tension to the fore in post-Sadam Iraq. Majoritarian democracy applied to Iraq would mean 'a national government mainly or exclusively Shi'ite majority that excludes Sunnis and Kurds...and it will be naïve to expect such

¹⁹³ See survey by Afro Barometer, *Survey in Ethiopia: Round 8*, 2020.

minorities condemned to permanent minority to remain loyal or constructive.¹⁹⁴ With it comes the issue of why ethno national minorities under perpetual rule of a majority could be expected to be loyal to such regime and stay in the union. The general assumption of majoritarian democracy that the rulers alternate such that today's political majority will become tomorrow's political minority does not hold true in deeply divided societies. In this context majoritarian institutions may suffer from legitimacy crisis. The decisions of the majority are not accepted by the minority. The values of the centrist state such as the flag, the national anthem, public policy, the media, language and cultural policies that are instruments of centralised nation building are deeply resented and rejected by ethno national minorities. Thus, alternative theories such as consociational democracy have been recommended when the political system faces deeply divided cleavages. Instead of having winners and losers, consociational democracy brings major political actors either on equal (as in Belgium) or through proportional arrangements to power and insists on consensus decision making on fundamental issues. Joint and consensus based decision making at the center could reduce the tension between the different groups. Thus left-outs in the majoritarian democracy become decision makers through power sharing, reducing the potential for conflict. Distinct institutional arrangements thus matter in managing cleavages and reducing conflicts. Consensus based decision making at federal level on key political, diplomatic and economic issues serves as trust building scheme mitigating the potential for conflict. In some countries such power sharing arrangement is combined with federalism that also ensures political autonomy at constituent level. This is the widest possible offer the nation state could provide (short of secession) as means to ensure peace, stability and success in polity building. This institutional arrangement with the menu of shared rule at center and self-rule at constituent level builds the sense of belongingness of different groups—critical requirement for building loyalty to the overarching state. Power sharing arrangements could result in government crisis as often seen in Belgium or Israel and there is rich literature showing the risks but the benefits outweigh its shortcomings when it comes to deeply divided societies. The choice for such countries is between fragmentation and never

¹⁹⁴ Arend Lijphart, 'Constitutional Design for Divided Societies,' *Journal of Democracy* 15:2 (2004): 98. The Shia are estimated to be 64% and the Sunni 34%. Arab (65%) vs. Kurd (30%) divide is also an issue in Iraq.

ending conflict, tension and war or possibly durable, more inclusive and slow but consensus based decision making process. If securing durable peace and inclusion are identified as core goals, the benefits outweigh its limitations.

1.4.4.1 Demo or Demoi; *Nation or Pluri-Nation?*

As already implied in the preceding discussions, the nation state and its integration/assimilation policy assumes a single people (*demo*).¹⁹⁵ The nation state and nation building's main goal is to construct single national identity based on the core nation on non-core groups. It is a compact among citizens, not a federation among many mobilized ethno national groups (*demoi*). Majoritarian democracy and its democratic legitimacy rests on the 'people' and the citizen as an individual but as will be shown later, defining the people is central to the debate in divided societies. Erk noted, 'The center and the constituent units are orders of governments of the same nation.'¹⁹⁶ 'With the sole exception of the state's citizenship, they are against the public institutional recognition of group identities'¹⁹⁷ and aims at public *homogenization* through common citizenship.¹⁹⁸ The definition of who the people constitute is critical in constitution making, amendment and settlement of claims for self-determination. If it is one people, the process of constitution making and its adoption goes through single consultative process. Same people decide its political destiny. It is different when one faces pluri-nation that might need a more complex process of consultation as the constituent power resides in two or more nations. This was made clear in Quebec secession referendum case.¹⁹⁹

In a single nation, public policies such as education and history, language, media, culture, national symbols, legal system are used as tools

¹⁹⁵ John McGarry, Brendan O'Leary, and Richard Simeon, 'Integration or Accommodation? The Enduring Debate in Conflict Resolution,' in Sujit Choudhry ed., *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford: Oxford University Press, 2008): 41.

¹⁹⁶ Jan Erk, 'The Sociology of Constitutional Politics: Demos, Legitimacy and Constitutional Courts in Canada and Germany,' *Regional and Federal Studies* 21(4) (2011): 524.

¹⁹⁷ John McGarry, Brendan O'Leary and Richard Simeon (n 95): 41.

¹⁹⁸ Ibid.: 42.

¹⁹⁹ Sujit Choudhry, 'Secession and Post-Sovereign Constitution Making After 1989: Catalonia, Kosovo and Quebec,' *International Journal of Constitutional Law* 17:2 (2019): 461–469.

to promote single public identity. Public policy also plays a key role in making sub state identities publicly invisible.²⁰⁰ As it is a product of the nation state, it promotes one (national) identity and discourages sub state identities. It promotes and nurtures the chosen identity of the political elite that controls power and is thus not inclusive. Identity then becomes a means for inclusion (source of pride) or exclusion (source of subordination and stigma) and tool for mobilization by the left-outs to end their subordinate position. It is 'rooted in the old liberal principle that the individual is the only atom from which to construct and analyse society.'²⁰¹

The limitations of this model in dealing with groups that are mobilized against the center became clear towards the mid-twentieth century and thus the nation state was forced to reconfigure itself to provide space for sub state entities.²⁰² One could argue in this sense that it was integration applied in the context of deep cleavages that produced political mobilization. Failed integration thus led to accommodation systems where mobilized ethno national groups in the above countries are by design made majorities at sub unit level to ensure the right to self-government to *groups as entities*. The old liberal model based on the individual had to give in and be reformed to create space for left outs.

Deeply divided societies are on the contrary *pluri-nations* and demand for political recognition and empowerment of many nations, not one nation in the country. As argued by Erk, 'Democratic legitimacy is based on the union between multiple *demos*. And not every constituent nation sees the union in identical terms. For English speakers, Canada is a federation of ten provinces; for French speakers, it is a union of two nations.'²⁰³ The center and the constituent units are orders of governments of different nations. There is thus competing views on the nature of the union and the source of democratic legitimacy owing to multiple *demos*. Thus, unlike integration, accommodation promotes *dual or multiple* identities and public policy as well aim to achieve the same goal. The debate between 'one people' vs. multiple *demos* has implications for institutional design. In the presidential federal nation state model,

²⁰⁰ Kymlicka (n 8): 42–43.

²⁰¹ Elazar (n 140): 4.

²⁰² See for details Kymlicka (n 8): 61–62.

²⁰³ Erk (n 196): 524.

the goal is to construct *one people out of many* and by design prevents ethno national groups from becoming constituent unit majorities.²⁰⁴ In other words, it does not ensure group self-government at sub state levels. In a context where the 'nation state' remained as the dominant political framework,²⁰⁵ a fundamental question then is how to design an inclusive, stable and cohesive political system amidst a society with more than one politically mobilized ethno national groups contesting for power.²⁰⁶ The idea that the nation state has difficulties hosting territorially based and politically mobilized ethno national groups is now less contested. Experts provide a rich menu of alternatives depending on the nature and level of mobilization of the cleavage. Parliamentary consociational federations have space for pluri-nations and details on its theoretical foundations and its operations are provided in Chapter 4.

Lastly, the nation state along with its centralizing feature in Africa has been the source of state failure and never ending conflicts. Markakis aptly wrote:

No state in this region (Horn of Africa) has been able to adequately perform the functions generally assumed of it: control its borders, exercise a monopoly on the means of force within its borders, enforce the law equitably throughout its domain, protect the life and property of its subjects, and administer justice impartially. The region holds several continental records for political unrest: five wars between states, two of the longest wars, two secessions from existing states, and one state collapse. Furthermore, almost every self-identifying ethno regional group has started at least one national liberation movement.²⁰⁷

State failure to manage the political forces that arise from ethno cultural, regional, and socioeconomic differences and the disparities they represent is most obvious in the Horn of Africa. In Africa, ethno nationalism has proved incompatible with the alien nation state model. The persistent effort over decades to confine ethnic groups to the dictates of nations has

²⁰⁴ John McGarry, 'Brendan O'Leary, Must Pluri-National Federations Fail?' *Ethnopolitics* 8:1 (2009): 8.

²⁰⁵ Ephraim Nimni, 'Minorities and the Limits of Liberal Democracy: Democracy and Non Territorial Autonomy,' in Tove Malloy and Francesco Palermo eds., *Minority Accommodation Through Territorial and Non Territorial Autonomy* (2015): 61.

²⁰⁶ Stepan et al. (n 13): 1.

²⁰⁷ Markakis (n 134): 20.

undermined effective government in Africa.²⁰⁸ Succeeding generations of African political elites have adopted the nation state as the bases for modernization, and made national integration the highest political goal. Since most newly independent African states were diverse, homogeneity needed to be achieved by nation building, even by force if necessary. The forceful pursuit of nation building has been the cause of unending conflict in Africa, especially in the Horn, with ethnic cleansing, massive population displacement, successive waves of refugees, political instability and enormous human suffering. In the emotive words of Basil Davidson (1992),²⁰⁹ the nation state has been a ‘curse’ and the ‘Black man’s burden.’²¹⁰

In Ethiopia, the fact that Emperor Menelik created modern Ethiopia by liquidating and bringing all former quasi autonomous kingdoms and Emirates did not ensure all people in this territory to share the same common hood. Bringing different territories under one roof is one thing, creating institutional and policy systems to such communities and instilling sense of common identity that cuts across the sub unit identities is a different matter. Ethiopian elites are stuck in the past and un able to identify the difference between the two: creating the territory vs. polity building- the work that has to be done on the people to build sense of shared common hood. One needs to have the right ideology, political framework and public policy instruments to transform conglomerate of identities to share some sense of common hood despite differences in language, culture, religion etc. Some are stuck in the nineteenth century hoping that the sub units will dissolve one day and still envision centralized nation state that is Amharic speaking and Christian Ethiopia or something close to it (geographic federalism, citizenship politics are the new versions of it). As will be illustrated in detail in several chapters later, identities do not wither away and are not transient as the different schools of thought anticipated. We need to find ways to manage diversity and there are by now many advanced alternatives than the nation state. Crafting right polices and institutions that allow people to live together despite differences is now the new normal, not the nation state.

²⁰⁸ Markakis, Schlee and Young (n 103): 14.

²⁰⁹ Basil Davidson, *The Black Man’s Burden: Africa and the Curse of the Nation State* (New York: Time Books/ Random House, 1992).

²¹⁰ Markakis, Schlee and Young (n 103): 13.

In Ethiopia the polity building was led by the centrist elite that had built the Ethiopian Empire.²¹¹ The process of expanding and annexation of territories in the south, west and east in the name of nation building was certainly brutal and coercive and had serious consequences on the local population that continue to be debated even today. The assimilation project was preceded by liquidation of quasi autonomous kingdoms, a project undertaken by Emperor Menelik II (1889–1913) ending what Clapham calls the era of ‘devolved autocracy.’²¹² The decentralized feudal state structure changed radically with the emergence of a strongly centralized unitary state toward the last quarter of the nineteenth century spearheaded by Emperor Menelik II that was further consolidated during the reign of Emperor Haile Selassie (1930–1974),²¹³ an absolute monarch, followed by the military socialist regime (1974–1991) that replaced it, giving rise to a protracted civil war and political instability for the most part of the last century.²¹⁴

The process led to dispossession of land by the new elite that turned the local population to tenants (the *Gebar* System). With the central government expanding (others would say reclaimed back its previous territories) its control to the south and south west along with the *Gebar* system (which provided land—a critical resource—to the imperial army in the conquered territories and left the local people landless and servants of the new lords.²¹⁵ With the emergence of the centralized unitary state, Showa, Menelik’s home province emerged as hegemonic center of power and resources. According to Edmond Keller and Clapham, of the 156 high ranking officials recruited and appointed by the central government between 1944 and 1967, were predominantly from Showa with only five coming from the peripheral areas. Nearly all provincial governors and cabinet members towards the end of 1960s came from Showa as well. Seventy percent of Ethiopia industrial activities were concentrated in Showa, Awash Valley and Asmara. Other sectors such as education and

²¹¹ See for details Edmond Keller, *Revolutionary Ethiopia: From Empire to People’s Republic* (Bloomington: Indiana University Press, 1988).

²¹² Christopher Clapham, ‘The Ethiopian Experience of Devolved Government,’ *Ethiopian Journal of Federal Studies* 1:1 (2013): 18.

²¹³ The 1955 Revised Constitution Article 4.

²¹⁴ Gebru Tareke, *Ethiopia: Power and Protest: Peasant Revolts in the Twentieth Century* (Cambridge University Press 1991).

²¹⁵ Clapham (n 148): 34.

health also reflected massive imbalance between provinces with Showa standing at the top.²¹⁶ Showa then emerged as the epi-center of power, resources, and homogenizing centrist state, liquidating quasi-autonomous kingdoms.

Besides, in the imperial state, national integration was predicated on Christianity and the Amharic language, and was aptly known as Amharization.²¹⁷ To do this, Tedla Hailu, Belgium trained centrist Ethiopian elite and close family of Emperor Haile Selassie wrote 'Ethiopia has to adopt policy of assimilation in which people will abandon their customs and social organization and adopt the language and religion of the Amhara.²¹⁸ This change of identity should be carried out, Tedla insisted, by the Oromos, who would thus become Amharas, rather than the other way round, because the Amharas alone possessed a written language, as well as what he termed superior customs and religion.²¹⁹ In a government owned newspaper, it was written in 1926 (E. C), 'the intention of the Ethiopian government (the then ruling elite) is clear. Every Ethiopian should learn and speak Amharic, it is key for national unity and integration.'²²⁰ This was reflected in the 1931, 1955 constitutions and several other policies and remained the framework for centralized Ethiopia until 1991. Some experts like Donald Levine²²¹ even went to the extent of declaring 'greater Ethiopia as a very successful nation built from within' focusing on the historical interactions and the Amhara and Christian

²¹⁶ See for details Edmond Keller (n 211): 137–140; Christopher Clapham, 'Centralization and Social Responses in Southern Ethiopia,' *African Affairs* 74 (1975): 73–75.

²¹⁷ Markakis (n 134): 25. Known provincial governor's name had to be changed as a result. Kumsa Bereda, the governor of Wollega was baptized and given a Christian name Gebre Egzabher. Ras Ali, King of Wollo was renamed Ras Michael. The last ruler of Janjero Abba Bagibo was renamed Gebre Medhin. The last king of Limmu Abba Gomboli became Gebre Selassie.

²¹⁸ See Richard Pankhurst, 'Tedla Hailu and the Problem of Multiethnicity in Ethiopia,' *North East African Studies* 5:3 (1998): 81–96.

²¹⁹ Ibid.: 86.

²²⁰ *Selam Gazetta Tahsas* 19, 1926 E. C.

²²¹ Donald Levine, *Greater Ethiopia: The Evolution of a Multiethnic Society*, 2nd edn (Chicago: The University of Chicago Press, 2000). This was nicknamed as 'great tradition' founded on ancient civilization with its origin in the northern and central highlands that defeated colonialism. Since the emergence of the Ethiopian Student Movement the ethno national liberation movements effectively challenged this framework.

based integration, only to be taken by surprise following the emergence of the Ethiopian Student Movement, the national liberation movements and the post-1991 political developments. The loss of local autonomy following centralization, political and economic control by the ruling elite, the process of Amaharization and the *Gebbar* system created a system of class and national oppression in most parts of Ethiopia particularly in the South and south west. The new ruling elite distinct both in terms of class and identity was to become a source of resentment and an incubator of ethno nationalism hence the articulation of these issues by the Ethiopian Student Movement and their slogans ‘land to the tiller’ ‘the nationality question,’ social justice and religious equality became the main tools for mobilization leading to the 1974 Revolution.²²²

The military junta made gestures to address the emerging demands from ethno national groups when it came to power and toward the end of its era. It declared all nationalities to be equal but did not end the marginalization from power and resources and failed to ensure the right to self-rule. More important, its rigid insistence on military solutions to political issues blocked all hopes for peace. An obliterated form of regional self-rule was included in the 1987 constitution, but by then it was too little too late to attract an already emboldened ethno national groups.²²³

As it turned out, however, the promotion of dominant group nationalism was to be checkmated and confounded by the countervailing force of its opposite number, which is the emerging nationalism by ethno national groups. Many resisted assimilation forcefully, ultimately making the task of the nation state builder’s mission impossible. The post 2018 centrist elite and Abiy are trying it again only to realize very soon that it exploded on their face in Tigray following the November 2020 war.²²⁴ In the case of Ethiopia, Amharization and the relationship based on hierarchy created resentment to ethno national groups giving birth to the ‘nationality question’ and the countless ‘national liberation fronts’ that waged war against the center, the coalition of which brought the centralized nation state to its knees in 1991. Centralized nation building project was an incubator of sub unit forces as a reaction to its political, economic

²²² The 1955 Revised Constitution Article 125 and 126; 1987 CONST. Article 116.

²²³ Andargachew Tiruneh, *The Ethiopian Revolution: 1974–1987* (Cambridge: Cambridge University Press, 1993).

²²⁴ Markakis, Schlee and Young (n 103): 17.

and identity based suffocation. The elite, who promote the process of modernization qua Westernization, rely on the state to advance their vision of the future, thus making the state a participant in conflicts that reveal the tensions within the diverse African society. Yet, the state itself is incapable of managing the political dimensions that arise from these social conflicts. As argued by Markakis, Young and Schlee nation state is the center of the cause.²²⁵ A close to a century of centralized nation building project collapsed and the cost was immense. It was a lost century for the country. Markakis, Young and Schlee rightly wrote the refusal to accept mobilized ethno nationalism as a reality and accord it political recognition and accommodate it through right institutions is the root cause of the prevailing instability. The nation state is ‘wrong model’ and thus actors have to consider alternative systems of governance.²²⁶

1.5 CONCLUSION

Given the complicated nature of the territorial cleavage, the level of political mobilization, the nature of the elite that frames the issues and state response (accommodative, integrative or repressive), schools of thought vary on whether the ‘cleavage and difference be recognized, emphasized, institutionalized and empowered or should it be diffused, blurred, transcended’²²⁷ and disempowered. Yet, although little explored in the comparative literature in Africa, at least from the institutional design perspective, there seem to be implicitly two options. The first, usually called the integrationist or centripetal system, is associated with Donald Horowitz with its ideological roots in the USA, and is reflected in the constitutions of Nigeria, South Africa and Kenya. The second is largely a European and has partly leftist origins, and is known by different names as *pluri-national*, multinational or ethno national based federations with

²²⁵ Ibid.: 20.

²²⁶ Markakis, Schlee and Young (n 103): 17.

²²⁷ Christina Murray and Richard Simeon, ‘Recognition without Empowerment: Minorities in a Democratic South Africa,’ in Sujit Choudhry ed., *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford: Oxford University Press, 2008): 411. Here comes the debate between primordialism and social constructivism, integration vs. accommodation and equally divided is on how to manage it and the institutional options available.

its core feature of accommodation policy towards territorially based politically mobilized cleavages often combined with power sharing. The details and limitations of both alternatives are provided in Chapter 4.

Societies with deep divisions as in Ethiopia face enormous challenges related to politically mobilized identity based cleavages that need distinct political, institutional and policy arrangements. Nation building as understood in the traditional sense that insists on assimilation and integration can only fuel conflicts. Ethno national/regional based cleavage and political mobilization is often a reaction to centrist elite's project and a search for finding a political and identity space. It is a sub state nationalism framed in reaction to the central government's nationalism. There are competing nationalisms within the nation state that if not addressed could lead to violence, civil war and state fragmentation. Both are pursued in the name of nationalism and have the potential to fuel the passions and emotions from both sides of the political spectrum to cause political instability and state collapse. One is pursued by the central government in the name of nation building, patriotism, civic nationalism, unity, ensuring territorial integrity and the other by the ethno nationalist elite aiming self-government, representation and possibly secession. In the menu of options, theories such as consociational democracy have been recommended when the political system faces deeply divided cleavages. Instead of having winners and losers, consociational democracy brings major political actors either on equal (as in Belgium) or through proportional arrangements to power and insists on consensus decision making on fundamental issues. Thus left-outs in the majoritarian democracy become decision makers through power sharing, reducing the potential for conflict. Distinct institutional arrangements thus matter in managing cleavages and reducing conflicts. This usually is combined with federations that also adopt parliamentary systems. Consociational parliamentary federations would then deploy consensus based decision making at federal level on key political, diplomatic and economic issues that serve as trust building scheme mitigating the potential for conflict. In some countries such power sharing arrangement also ensures political autonomy at constituent level. This is the best possible offer a country could provide (short of secession) as means to ensure peace, unity, stability and system of inclusive polity building. This institutional arrangement builds the sense of belongingness and loyalty of different groups towards the overarching state beyond and above other manifestations of identity: critical requirement for building the polity in societies with deep divisions.

One should however caution and face the reality. Inclusive political systems of one type or another that have the potential for polity building are challenged by *ethnocracy* and regime's determination and insistence to use violence to address political demands. This makes democratization and federalism mission impossible. Federalism whatever form it may take is inherently about a peaceful on going bargaining and negotiation between centripetal (unity) and centrifugal forces (diversity). Federalism takes a 'system of negotiated political accommodation' as *norm* and rules out violence.²²⁸ Success in federalism implies absence of war and violence. Threats of secession as in Quebec and Scotland do not wither away but institutionalized federal bargain provides an avenue for a compromise. In many countries in Africa including Ethiopia, negotiated political accommodation is replaced by violence. Federalism has not failed but has been *betrayed* both in the past and present from serving as a venue for intergovernmental bargain and negotiated reform.

The federal and devolved systems manifest centralizing features curtailed by the nature of state power in the continent. Whatever institutional designs are put in place, big men, hegemonic and dominant parties are the actual machines that operate the designs. The nature of power in Africa- an imperial center (regardless of whether the design in the constitution is presidential or parliamentary, integration or accommodation) and the patron-client relations between the center and sub units; stability imperative- the claim by the center to contain centrifugal forces also explain the unitary features of African federal and devolved systems. Within these broad observation however, political pluralism and the progress towards democratization in Kenya and Nigeria has opened an opportunity for sub state governors to assert and exercise some level of autonomy as opposition parties have been able to win seats in several states. While in Ethiopia the hegemonic party has command and control over sub units. Ethiopia is an extreme case of central political control and complete disregard of the constitution with little or no progress towards democratization. This context explains the political explosion it continues to face. Donald Horowitz argues the opening up of local political space (partly as in Nigeria and Kenya at least at sub unit level) averts the likely hood of ethnic separatism: losers at federal level can still enjoy self-government at sub unit level. Politics is not any more zero-sum game

²²⁸ Thomas Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Inquiry* (Toronto: University of Toronto Press, 2015): 4.

and this reduces the high stakes of power at the center. Marginalization at federal level and denial of self-government at sub unit levels reinforces alienation and separation.²²⁹ This is what is happening in Ethiopia. It is zero-sum game and the stakes are high and very risky for the country.

²²⁹ Donald Horowitz, *A Democratic South Africa? Constitutional Engineering in a Divided Society* (Berkeley: University of California Press, 1991): 221–223.



CHAPTER 2

Federations: Concept, Theory and Main Features

Since the end of the Cold War, federalism has been on the rise but it also continues to face setbacks. This chapter discusses federalism's origin and the factors contributing to the continued interest. In the following eight sections, this chapter elaborates some of the general features that one observes among polities called federations. The key pillars of federations as distinct from other forms of organizing polities are discussed. Because every federation operates within a specific context, overemphasizing on those common characteristics does not explain why federations evolve in different ways. The real forces social, cleavages and political that necessitated the establishment of the federation matters most in understanding the dynamics of federal systems. The last section thus considers some of the extra-constitutional factors explaining the divergent pathway. The main contribution of this chapter is clarifying key concepts that together with the preceding chapter serve as framework for analyzing federations. It also explains the two major forces: unity and diversity and how they impact self-rule and shared rule in federations.

2.1 INTRODUCTION

Within the framework and basic feature of federal systems that are discussed in this chapter, it is vital to note that there have been shifts within the federalism discourse across time. In the 1950s when the nation state model was a dominant hegemony Harold Laski wrote federalism has come to an end.¹ In the 1970s, the human right revolution (rights of ethno national minorities, indigenous people, gender equality, multiculturalism)² made federalism counter the nation state framework and many countries in the west among others Spain, UK, Canada, Italy and Belgium have reconfigured their nation state to accommodate sub state based nationalism, regionalism and ensured political autonomy to Catalonia, Scotland, Quebec, South Tyrol and Flanders respectively. Existing nation states were reconfigured to open up space through constitutional designs that made sub units a majority in their territory and enjoyed political autonomy while also providing fair representation in federal institutions (UK and Spain ensure only autonomy without shared rule). In the case of Canada and Belgium they even went further declaring themselves as multinational and recognizing multiple identities. The centripetal and centrifugal forces were kept on delicate balance, the balance swaying in different directions at different times. The coercive nation building process that left out some groups in these countries was renegotiated and the new social contract has made significant progress in the federalism discourse. Federalism's relevance as a means to manage diversity and reduce conflict in a context of politically mobilized diversity owes its origin to this development. Switzerland remains the grand exception as from the outset (1848) it never adhered to the assimilationist nation building project. Equality of all languages and its consociational federal arrangement along with substantial cantonal autonomy served as glue to an otherwise multi-ethnic country in the heart of Europe. Any serious constitutional reform requires popular and cantonal consent and the Swiss federation also engages citizens through direct democracy.³ For most

¹ Harold Laski, 'The Obsolescence of Federalism,' in D. Karmis and W. Norman eds., *Theories of Federalism: A Reader* (Palgrave: New York, 2005).

² Will Kymlicka, *Multicultural Odysseys* (Oxford: Oxford University Press, 2007): 6.

³ Nicholas Schmitt, 'Swiss Confederation,' in J. Kincaid and A. Tarr eds., *Constitutional Origins, Structure, and Change in Federal Countries* (Montreal, QC: McGill-Queen's University Press, 2005).

other countries, it took centuries of contestations between rival national groups to reconfigure the nation state to accommodate sub national identity and this happened only since 1970s within federations in the west and more so in the third world after the end of the Cold War. Recognition and empowerment of diversity is thus a late twentieth century development.⁴ Some referred to this era as a ‘paradigm shift,’⁵ kind of federalist wave.⁶ Contrast this with one of the classic works on federalism by Riker, *Federalism: Origin, Operation, Significance*⁷ where he theorizes about the emergence of federalism mainly from the perspective of *security*: military and diplomatic. Countries adopt federalism either to avert military or diplomatic attack or to bring together forces and make military and diplomatic offensive. Riker argues these are the main reasons that cause the federation emerge and operate and once these conditions cease to exist, federalism ends and becomes either a unitary state or fragment into many new states. This may have served as theory of federalism for the older federal and confederal systems (United States, Switzerland) but it will be absurd to explain India’s federal progress since 1949 or the post-Cold War theory of federalism as a means to manage cleavages, bring peace balancing unity and diversity using Riker as a framework.

After the end of the Cold War, federalism and devolution was introduced in many developing countries of the third world (Africa, Asia, and Middle East) as means to manage diversity and reduce conflict. The discourse on federalism was linked to ensuring peace in many conflict and post conflict societies. This is not without reason. Following the end of the Cold War, interstate conflicts reduced significantly (except in the Russia-Ukraine case) while intra state conflicts associated with demands for recognition, self-government, autonomy and secession within nation

⁴ Alain-G Gagnon, ‘Multinational Federalism: Challenges, Short Comings and Promises,’ *Regional and Federal Studies* 31:1 (2021).

⁵ Daniel Elazar, ‘From Statism to Federalism: A Paradigm Shift,’ *Publius: The Journal of Federalism* 25:2 (Spring 1995) at 15; Ronald Watts, *Comparing Federal Systems*, 3rd edn (Montreal and Kingston: McGill-Queen’s University Press, 2008).

⁶ Daniel Elazar, *Federalism and the Road to Peace* (Kingston, Ontario: Institute of Intergovernmental Relations, Queen’s University, 1994): 21–25.

⁷ William Riker, *Federalism: Origin, Operation, Significance* (Boston: Little Brown, 1964).

states increased dramatically.⁸ Differences arising from ethnic and religious backgrounds within states reinforced by deprivations from power and resources have become causes to conflict and violence.⁹ According to some studies there are 5,000–8,000 ethno cultural groups in the existing 200 or so states. Of these, one-tenth of them are estimated to have interest for self-rule and some form of autonomy.¹⁰ Indeed this is more acute in Africa where boundaries were hastily and artificially drawn during the scramble for the continent. One could thus see the obvious tension between those who want to maintain the status quo and those who want to adjust it and it is where federalism comes as rescue. As a result of these shifts in the nature of conflict and increased efforts by regional and international organizations such as the United Nations to contribute to peace building and ending war, federalism has become an integral part of the institutional response and a major instrument in constitutional design process to address intergroup conflicts. The balance between substantial autonomy for minority groups, at times combined with representation in central institutions while ensuring the territorial integrity of the state is seen as one of the key elements of successful conflict resolution ending the root causes of violence in societies as diverse as Bosnia and Herzegovina (1992–1995), Ethiopia (post-1991), Nigeria (since 1999), South Africa (since 1991) and Nepal (1998–2008) among others.

Federalism provides solution to the root causes of identity based conflicts. Political and economic injustice caused by the state remains at the heart of identity based mobilization (relative deprivation theory: systematic and identity based deprivation of groups from power and

⁸ T. Pettersson, and P. Wallensteen, 'Armed Conflicts, 1946–2014,' *Journal of Peace Research*, 52:4 (2015): 537; see also Soeren Keil, 'Federalism as a Tool of Conflict Resolution,' in John Kincaid ed., *A Research Agenda for Federalism Studies* (Cheltenham, UK and Northampton, MA, USA: Edward Elgar Publishing, 2019): 151–161.

⁹ Since 1945 ethnic violence has played a major role in about half of all wars, caused an estimated 12 million refugees and resulted in at least 11 million deaths and because contemporary wars are between people rather than states, civilian casualties have increased tremendously. It is estimated that some three quarters of today's war casualties are civilians. Nancy Bermoe, 'A New Look at Federalism: The Import of Institutions,' *Journal of Democracy* 13:2 (April 2002) at 96.

¹⁰ See for instance Dimitrios Karmis and Wayne Norman, "The Revival of Federalism in Normative Political Theory," in Dimitrios Karmis and Wayne Norman eds., *Theories of Federalism: A Reader* (New York: Palgrave Macmillan, 2005): 13.

resources/economy¹¹) but the search for dignity, demand for recognition, collective security and self-esteem are the core factors that flames and gives it the emotive force. While the relative deprivation theory focuses on the power and resource element, the human needs theory¹² goes much further than that to include the need for collective security, right to exist as a group, prevention from threats of genocide and ethnic cleansing—the passions and emotions beyond the material interests of ethno national minorities.¹³ The gist as argued by Connor goes ‘Better a government run like hell by Filipinos than one run like heaven by Americans.’¹⁴ Federalism provides an inclusive political system at the center and autonomy at sub unit level. Recognition and accommodation are pillars of federalism and this combination goes long way in responding to identity based conflicts. As a result, ensuring peace within states, ending war and conflict became preoccupation of local, regional and international actors and federalism with its promise of promoting unity and ensuring self-government at constituent unit level was hoped to be an ideal solution and magic compromise accommodating the two rival interests.

The role of federalism in managing diversity as briefly indicated above is linked with the concept of ‘federal society’¹⁵ originally developed by Livingston and later developed by Jan Erk¹⁶ and other authors. As will be shown later, federalism as initially conceived was a juridical concept, an institutional phenomenon that divides competences between the federal and sub unit governments, each level of government enjoying constitutionally entrenched autonomy. K. C Wheare’s work in what later known

¹¹ Ted Robert Gurr, *Minorities at Risk: A Global View of Ethnopolitical Conflict* (Washington: United States Institute of Peace Press, 1993): 18–20; see also Sujit Choudhry and Nathan Hume, ‘Federalism, Devolution and Secession: From Classical to Post-Conflict Federalism,’ in Tom Ginsburg and Rosalind Dixon eds., *Comparative Constitutional Law* (Cheltenham: Edward Elgar, 2011): 364.

¹² See for details John Burton, *Violence Explained* (Manchester: Manchester University Press, 1997): 32–37.

¹³ Dawn Walsh, *Territorial Self Government as Conflict Management Tool* (Cham: Palgrave Macmillan, 2018): 4–5.

¹⁴ Walker Connor, ‘Nation Building or Nation Destroying?’ *World Politics* 24:3 (1972): 343.

¹⁵ W.S. Livingston, ‘A Note on the Nature of Federalism,’ *Political Science Quarterly* 67:1 (1952): 81–95.

¹⁶ Jan Erk, *Explaining Federalism: State, Society and Congruence in Austria, Belgium, Canada, Germany and Switzerland* (London: Routledge, 2008).

to be comparative study of classic federations remained dominant in this regard.¹⁷ However the institutional-legal approach to federal systems though useful as a framework of analysis to distinguish them from other forms of organizing polities does not explain the real forces: political, social, ethno national, regional that necessitates the establishment of the federation. Livingstone thus argued the essence of federalism is not in the institutions or the constitutions but in the society itself and by that he meant the geographically concentrated diversity. Jan Erk took this analysis one step further and demonstrated that territorially based diversity as in Canada, Belgium, Switzerland tend to push towards more devolved federal system, compared to federal systems such as Austria or Germany where the federations tend to be more centralized. The logic is the institutions of federalism adapt or match to achieve *congruence* with the underlying cleavages in society.¹⁸ In other words, the design of federal institutions is not done in the abstract but is impacted by the nature of cleavage in society. Yet this approach in itself is far from complete. Social, religious, linguistic, regional diversity is state of fact and may not necessarily impact institutional design and does not always have political relevance. It could remain merely as an anthropological fact. Indeed in today's world, homogeneity is an exception than the rule. As will be shown in detail in Chapter 4, it is not social diversity per se the main factor but the nature of the cleavage, level of political mobilization around identity (as opposed to other alternative forms of mobilization) for self-government and self-determination and state response (or the lack thereof). The literature on the nature of deeply divided societies and how that impacts institutional design thus address the gap left in the concept of

¹⁷ K.C. Wheare, *Federal Government*, 4th edn (London: Oxford University Press, 1963).

¹⁸ Erk (n 16): 3.

federalism as ‘society.’¹⁹ Federalism’s contested role in managing diversity and ensuring peace is strongly linked to these kinds of societies.²⁰

Very much related is the concept of federalism as dynamic or as a process. It was introduced following the Second World War as a means to ensure legitimate and effective government by incorporating and respecting sub-national entities that pre-existed as the new nation builders assumed power. To be legitimate and effective governments must respect and engage existing institutions of governance. To some extent this would explain the mushrooming of federal and quasi federal arrangements introduced following the end of colonialism in Africa in the 1950s and 1960s and the effort to bring in traditional institutions. The legal-institutional approach to federalism focuses on the idea of balance or equilibrium between centripetal and centrifugal forces. In some weak sense it does acknowledge vaguely the forces behind the institutions as centripetal and centrifugal ones but does not go further. The concept of federalism as a process was coined by Carl Friedrich²¹ and lately given a renewed life by Keil and Kropp²² and challenges the idea of federalism as balance. Whatever agreements made during the adoption of a federation do not remain static. The federation has to adapt, evolve and even shift in response to new developments and challenges.

The book edited by Keil and Kropp investigates why and how ‘federal arrangements’ in the Post-Cold War era emerge, function and succeed or

¹⁹ See Sujit Choudhry, ‘Bridging Comparative Constitutional Law: Constitutional Design in Divided Societies,’ in Sujit Choudhry ed., *Constitutional Design in Divided Societies* (Oxford: Oxford University Press, 2008): 4; George Anderson and Sujit Choudhry, ‘Territorial Cleavages and Constitutional Transitions: Political Mobilization, Constitution Making Processes and Constitutional Design,’ in Anderson and Choudhry eds., *Territory and Power in Constitutional Transitions* (Oxford: Oxford University Press, 2019); Arend Lijphart, ‘Constitutional Design for Divided Societies,’ *Journal of Democracy* 15:2 (2004); Andrew Reynolds ed., *The Architecture of Democracy: Constitutional Design, Conflict Management and Democracy* (New York: Oxford University Press, 2002).

²⁰ As will be shown later federalism as a mode of governance (other than ensuring peace) may be introduced for other purposes. South Africa and Kenya use devolution to ensure local development and service delivery. In other contexts, federalism’s peace making role may be combined with promoting development and service delivery.

²¹ Carl Friedrich, *Trends of Federalism in Theory and Practice* (Praeger Publishers, 1968).

²² Soeren Keil and Sabine Kropp eds., *Emerging Federal Structures in the Post-Cold War Era* (Cham: Palgrave Macmillan, 2022).

regress as in Russia, Myanmar and Ethiopia. As the editors ably demonstrate, federal arrangements although initially based on negotiated federal pact are ‘neither linear nor coherent or irreversible’ (p. 304). The editors build on Carl Friedrich’s (1968) concept of federalization as a process (p. 305) namely that federalism should be understood as a dynamic process that develops over time adapting to changing circumstances, not as a fixed institutional design’ (p. 4) and challenge the static and teleological conceptions of federalism. They develop an innovative framework of several dimensions of federal emergence.

The notion of federalism as a process has largely been side-lined since its first conceptualization by Friedrich. The editors and contributors have given it a more elaborate new life using it as framework to analyse broad spectrum of the Post-Cold War federal arrangements. Federations once adopted do not remain static. Political parties and elites (be it at national or local level), cleavages and their political demands, major events such as Covid-19 and war (intra state as in Ethiopia since 2020; inter-state as in Ukraine and Russia 2022) or military coup in Myanmar (2021) push such arrangements either towards centralization or decentralization, making it very dynamic, as opposed to the notion of federalism as an equilibrium or balance between unity and diversity.

The book does not however make distinction among the different ‘federal arrangements’ based on the level of political mobilization around identity for self-rule. Some are diverse but there is less mobilization around identity, South Africa being an example. These contrasts with Ethiopia’s countless national liberation fronts, Kurds of Iraq and Syria, Belgium, Catalan (Spain) and Scotland (UK) where deeply entrenched, territorially based political mobilization around identity and self-determination are pushing for more autonomy and secession. Such demands are framed and entrenched in relation to a particular territory that they consider as their ‘homeland’ and the very existence of the unity and territorial integrity of the state is put to test. The idea of federalism as dynamic process does not seem to capture well the essence of the source of dynamism in these particular contexts. One is thus tempted to introduce a further refinement between intense federal processes and softer ones. Intense processes although could remain tense and peaceful as in Belgium, they at times lead to violence and operate outside of the rule of law, as is the cases of Russia, Ethiopia and Myanmar. Federalism as a process though useful and perhaps relevant in explaining the *intergovernmental interaction* among the levels of governments is too broad and

vague to explain fully federalism's role in peace making. Besides intergovernmental relations is more a theory of the complex interaction between the different levels of governments that may exist in federal and decentralized systems (the South Sudan Constitution and many other decentralized systems in Africa) provide a chapter on intergovernmental relations and thus the concept is too broad and goes beyond federal regimes. It is also possible to incorporate sub national forces using decentralization or consociational mechanisms and thus is not distinct theory of federalism.

Coming back to the link between federalism's role in managing conflicts, we should note that with the fragmentation of former USSR and Yugoslavia, federalism was put to test and jury was out to find whether it was federalist failure or centralization and authoritarian party hegemony, the source of the problem. In particular two major strands evolved: those that argue based on the evidences from Canada, Switzerland, India and other pluri nation federations that remained both democratic and genuinely committed to the federal idea and thus remained stable on one hand and others that focused on former USSR, Yugoslavia that according to many observers were considered as sham or pseudo federations because they were centralized and effort to further reinforce centralization by some elites triggered their failure. Such federations were dictated by the centralized communist party that was an obstacle to the implementation of the constitution and federalism. They were federations in form, not in reality. They were not democratic and never committed to the federal idea.²³ The overriding view is thus whether federalism or devolution would lead to stability or instability depends on many other factors.²⁴

Some argued 'the design of a federal system in itself whatever type it may take 'on its own..., is not a panacea for conflict, nor however is it simply the next step on the road to secessionist conflict. It is at once a problem and a solution. Whether it is one or the other depends a great deal on other factors...'²⁵ The abstract debate as to whether federalism is a problem or a solution (articulated as *paradox* of federalism)

²³ Daniel Elazar, *Exploring Federalism* (Tuscaloosa: University of Alabama Press, 1987); Philip Roeder, 'Ethnofederalism and the Mismanagement of Conflicting Nationalism,' *Regional and Federal Studies* 19:2 (2009): 203–219.

²⁴ John McGarry, Brendan O'Leary, 'Must Pluri-National Federations Fail?' *Ethnopolitics* 8:1 (2009): 11; Jan Erk and L. Anderson, 'The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Division?' *Regional and Federal Studies* 19:2 (2009).

²⁵ Erk and Anderson (n 24): 191–202.

was subject to a careful scrutiny and the verdict was far from conclusive but hinted there are conditions under which it may be a solution and in their absence could be a source of problem. The conditions apart from the pillars of the federal design discussed in this chapter are known by different names: extra constitutional factors. The list is long but include the presence or absence of functioning state institutions (in Iraq, South Sudan and Somalia for example there is little federalism alone can do in the absence of basic functioning state institutions that are assumed to exist in any state be it federal or unitary); rule of law and constitutionalism (the absence of which has caused many federal and devolved systems in Africa to collapse or remain as mere promises); the degree of institutionalization of political power and whether political power is constrained and serving the public good or is in the service of the political elite and other informal networks (federalism is thus farce); dispute resolution mechanisms and whether the federal or devolved system is subject to an independent legal/constitutional constraints when either level violates the federal pact (constitutional court or supreme court); the political will (*Foedus*) and determination among actors to make the federation work (the absence of which caused many post-colonial federations in Africa fall into big men); dynamics of centralization and decentralization²⁶; democracy, the nature of cleavage and its level of mobilization and how the system treats citizenship and minorities throughout the federation and in the constituent units. Overall, there is no evidence that shows that well-functioning, democratic federations subject to rule of law and constitutionalism can lead to fragmentation and violence.²⁷ All these variables have been analyzed separately in the different chapters.

Recently, there are also some retreats from the federal idea. The rise of populist, right wing political parties and figures and their ambition to strengthen central authority, weaken systems of checks and balances and impose their will on sub state autonomy along with their anti-immigrant

²⁶ Experts indicate degree of centralization and decentralization in federations across time and how that impacts the federal system. See for details Paolo D, John Kincaid et al., 'Dynamics of De/Centralization in Federations: Comparative Conclusions,' *Publius: The Journal of Federalism* 49:1 (2018): 194–219. Whether the federation was coming together or holding together, the nature of the cleavage and level of mobilization (Canada vs. USA), modernization, war like contexts, the party system and how it aligns with the federal and sub unit governments also affect the federation.

²⁷ See McGarry, Brendan O'Leary (n 24): 8; Soeren Keil and Elisabeth Alber, 'Introduction: Federalism as Tool of Conflict Resolution,' *Ethnopolitics* 19:4 (2020).

and diversity rhetoric and policy is posing a threat to the gains made with respect to federalism and ethno national minority rights.²⁸ Spain, in response to attempted referendum on whether Catalonia needs to stay in the union or secede imposed central rule and jailed political leaders from the sub unit since 2017. A new far right party even aims to end the autonomy.²⁹ India under Narendra Modi is not only centralizing its federation but has also withdrawn a five decade promise (since 1947–2019) of autonomy to its restive Muslim dominated Jammu and Kashmir region. Unlike its predecessors that envisaged India as diverse, secular and multiethnic democracy, the BJP party, following its electoral victory in 2014 under Modi is pushing for centralization under Hindu majoritarian cultural nation that could frustrate India's gain made so far.³⁰ Secular and autonomous institutions that have evolved since 1949 are now falling into the hands of far right BJP party. Under Hindu nationalism, secularism has come under attack and India's minorities are treated as second class citizens. In the west, the rhetoric about the failure of multiculturalism has been on the rise interestingly from leaders and countries that half-heartedly adopted such policies.³¹ Ethiopia waged full blown war on Tigray and declared countless state of emergencies and military rule on its regional states in 2020–2023. These developments should serve 'as an important warning that in many cases where the central state opted to remove or threaten regional state autonomy – cases in point include East Timor, Eritrea, Kosovo, Montenegro, and Sudan (South Sudan) – regions affected have since gained their independence.'³² Thus a retreat from federalism is not the answer, a renegotiated social contract is.

²⁸ See for details Gagnon (n 4); see also Tarunabh Khaitan, 'Killing a Constitution by a Thousand Cuts,' *Law and Ethics of Human Rights* 14:1 (2020): 49–95. Populism comes in many ways. Often come with tin ideology and claim the elites in power do not represent the people and aim to bring strong leaders that claim to represent natives to power. They claim main stream parties have outlived their purpose and institutions have become unresponsive and want to do away the system of checks and balances and judicial autonomy leading to totalitarian system and pushing non natives.

²⁹ Keil and Alber (n 27): 332.

³⁰ Wilfried Swenden, 'India: An Emerging or Fragile Federation?' in Soeren Keil and Sabine Kropp eds., *Emerging Federal Structures in the Post-Cold War Era* (Cham: Palgrave Macmillan, 2022): 165–188; Khaitan (n 28).

³¹ See for details Will Kymlicka, *Multiculturalism: Success, Failure, and the Future* (Migration Policy Institute, 2012).

³² Gagnon (n 4): 109.

2.2 THE SIGNIFICANCE OF THE FEDERAL IDEA

Despite the horrific experience of interethnic tension and conflict following the end of the Cold War in the former USSR and Yugoslav federations,³³ in the contemporary world, federalism as a political idea remains still an option for reconciling unity and diversity under a single political system. Some twenty-eight countries of the world covering 41.5% of the population and 44.4% of the land mass live in countries that claim to be federations. The European Union with its originally expanding vision was evolving into a hybrid of confederal as well as federal institutions and popular post-war attractive and complex institutional design before it faced Brexit.³⁴ The wide ranging publications by the *Forum of Federations* and experts, including the two well-known journals (*Publius: the Journal of Federalism* and *Regional and Federal Studies*) and the institutes and centers that conduct cutting edge research in comparative federalism are also on the rise.³⁵

There are a number of reasons for this increased interest in federalism. We already indicated federalism's role in managing conflicts and more is provided in Chapter 4 focusing on Africa. The oldest explanation from the classic federations relates to the need for collective security, economic prosperity (common market and free movement of labor and capital within the union) defence alliance and foreign policy. Oldest federations thought they will be bigger and more powerful by coming together than facing the world in a fragmented way.³⁶ Others advocated federalism

³³ By now there are enough evidences indicating that these were window dressing federations because they were operating under communist dictatorships that is opposed to the idea of autonomous decision making inherent in federalism. Nor were they supported by democratic institutions. See Thomas Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Inquiry* (Broad View Press, 2006): 26.

³⁴ Watts (n 5): 1–10; Elazar (n 5) at 15.

³⁵ The Institute of Federalism based in Fribourg Switzerland was one of the oldest but since then we have many centers in Italy (Bolzano), the United States (two), Austria, Germany, India, South Africa and Ethiopia. Among the global networks we have the Canada based Forum of Federations that combine both academics and practitioners and continue to conduct research, training and policy advocacy across the globe.

³⁶ William Riker (n 7); K.C. Wheare (n 17): 3. W. Riker, one of the distinguished writers on federalism, limits the origins of federations to only two reasons. According to his famous 'law of federations' 'the necessary conditions in the federal bargain are that politicians, both those who offer and those who accept the bargain seek, *to meet* an external military or diplomatic threat or *to expand* militarily or diplomatically. It is

as a means to promote democracy and liberty. Federalism creates multiple centers of power (federal, regional state and local) and combined with horizontal separation of powers between the two levels of governments reduces the possibility of concentration of power in one center and creates favourable condition for liberty. Multiple centers of power means that citizens have multiple access points to power for participation and impacting policy and for ensuring accountability. The fact that the parliaments at different levels of governments are composed of elected leaders implies the strong link between federalism and democracy. Yet the idea of federalism as a means for promoting liberty needs qualification. The issue is whose liberty? In the nineteenth century United States, southern states used federalism as a disguise to continue the institutionalization of slavery although the federal government wanted to abolish it. This was realized only in the 1950s and 1960s with the rise of the civil rights movement. In Ethiopia, regional states continue to terrorise their minorities and are thus local tyrants. Some regional states dehumanize women by adopting illiberal practises (polygamy, under age marriage, female genital mutilation) and thus threaten gender equality. Regional state autonomy may be invoked to defend local custom and tradition that may contradict with constitutional obligations related to rights of women and children. Thus the link between federalism and liberty remains contentious and has to

important to understand the force of this law of federal origins. If framers overlook these necessary conditions their federations are likely to fail.' However, Riker himself later conceded that this may not necessarily explain all federations. In the case of Nigeria, it was formed, although there was neither a military threat nor expansionist ambition and his thesis seems questionable but at the same time he doubts if Nigeria is a federation at all. However, protection or expansion may be attained without necessarily joining as formal federations, see for instance Davis *supra*, 132–133. Against Riker's thesis, Dikshit wrote, 'we do not think that the military condition is a necessary condition in all cases of federations. Today with the rise of modern federations and its further course of integration necessitated by the rise of large scale industrial economy and globalization, military security can no longer be sufficient reason to explain federations. The purposes that bind federations are not narrowly limited to political or military situations.' R. Dikshit, *The Political Geography of Federalism: An Inquiry into Origins and Stability* (Delhi: Macmillan, 1975) at 35. More importantly, such an interpretation overlooks the central role of federations in accommodating diversity based on ethno-linguistic demands for autonomy. In the case of India for example, it is hardly acceptable to explain the federation's survival in light of military or expansionist theory. As Davis remarked, 'cultural diversity alone made unitary government in India unthinkable.' Rufus Davis, *The Federal Principle: A Journey Through Time in Quest of a Meaning* (Berkeley: University of California Press, 1978) at 137.

be seen from different angles.³⁷ Thus it may promote self-government to a national minority and yet local minorities may suffer under the new majority at constituent level.

Some link federalism with innovation. Constituent units can try distinct and innovative policies that fit their local context while respecting the standards set by the federal government. In some cases the federal government may as well sleep over a particular mandate and proactive regional state can regulate the matter until there emerges the need for a countrywide policy intervention to ensure standards. Although later misused, special police in the Somali region was established to address a peculiar security concern in which federal army faced difficulty understanding *local conflict dynamics*. Established by regional state, special police can effectively handle local security concerns as it better understands the local political and security context much better than the federal army and federal police distantly located. In a federation, regional states are considered *laboratories*³⁸ for trying new initiatives and policies that fit local context. Oromia introduced the seat belt system and was later reintroduced by the federal government. Tigray attempted to regulate COVID-19 way before the federal government took responsibility to address the pandemic. It goes without saying that Afar, Somali and other regional states with substantial number of pastoralists need innovative economic policy distinct from the highland based regional states.

Federalism as a political concept and federations in the form of institutions seem to provide ‘the closest institutional solution’ combining shared rule for some commonly shared purposes and self-rule for other purposes of regional interest in the world today. The reason is simply that there are double pressures calling on the one hand for larger political organizations due to rapid developments in transportation, social communication, technology and other shared values and due to growing awareness of worldwide interdependence. On the other hand there is pressure for

³⁷ John Kincaid, ‘Value and Value Trade Offs in Federalism,’ *Publius: The Journal of Federalism* 25:2 (Spring 1995): 29–44.

³⁸ In a dissenting Supreme Court decision Justice Louis Brandeis of the United States in *New State Ice Co. v. Liebmann* argued ‘It is one of the happy accidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.’ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

smaller self-governing political units³⁹ established not only to guarantee expression to various forms of diversity but also in some cases resulting from ethno-linguistic dissatisfaction with the present organization and operation of the “nation-state” and global world. Indeed, the late Daniel Elazar spoke of the world as in the midst of a paradigm shift⁴⁰ from a world of states (nation-states) to a world of diminished states. There is a global interdependence among highly unequal states and increased interstate linkages of a constitutionalized federal character. This development began after WWII but it was not until the collapse of the former Soviet Union that the extensive and decisive character of this paradigm shift became discernable to most people.

One could add to this the fact that the oldest federations in the West as well as some emerging stable federations like India have been able to survive and adapt to the changing realities in the world. The relative peace and stability together with economic prosperity contributed to attract the attention of those involved in state restructuring elsewhere in the world.⁴¹ Apart from ensuring individual freedoms, Spain, UK, Canada, Italy and Belgium have reconfigured their nation state in the last three decades to accommodate sub state based nationalism and ensured political autonomy to Catalonia, Scotland, Quebec, South Tyrol and Flanders respectively. The coercive nation building process in these countries was renegotiated and the new social contract has made significant progress in the federalism discourse. Federalism’s relevance as a means to manage diversity and reduce conflict in a context of politically mobilized diversity owes its origin to this development. It is about institutional recognition and empowerment of diversity.⁴² The relative peace and stability together

³⁹ Ivo Duchacek, ‘Antagonistic Co-operation: Territorial and Ethnic Communities,’ *Publius: The Journal of Federalism* (Fall 1977): 4–25; Hereinafter called *Antagonistic Cooperation*; Watts, *Comparing Federal Systems* (n 5) at 4; Elazar (n 5) at 5.

⁴⁰ Explaining this paradigm shift Daniel Elazar wrote, ‘it is not that the states are disappearing; it is that the state system is acquiring a new dimension. There are now networks of agreements that are not only militarily and economically binding for *de facto* reasons but are also becoming constitutionally binding *de jure*. This overlay increasingly restricts what was called state sovereignty and forces states into various combinations of self-rule and shared rule rather than limited into federations as we understand it today.’ States are now recognizing their interdependence and that rather than single centers there exist multi-centered decision-making units. Elazar (n 5) at 7.

⁴¹ Watts, *Comparing Federal Systems* (n 5).

⁴² Gagnon (n 4).

with economic prosperity of these federations contributed to attract the attention of those involved in state restructuring elsewhere in the world.⁴³

Employing federalism as a means for managing conflicts was aggressively pursued in many developing countries following the end of the Cold War albeit to varying degrees of success. Centralized and unitary states designed in the 1960s within the African continent resulted in one party authoritarian rule, big man (imperial presidents), skewed development, civil wars and state failure to deliver basic services outside the capital. One cannot deny the fact that the idea of federalism in Africa did not enjoy the popularity it enjoys elsewhere. Even the Ethiopian federal system that was introduced formally as of 21 August 1995 was adopted against a widely skeptical view about federalism at home⁴⁴ and across the continent. Although the central government in many parts of the continent is associated with inefficiency, it is considered by many as soft and corrupt and despite the continent's pluralistic nature and federalism's promise to accommodate diversity, the overriding aim almost everywhere in Africa was the nation-state model giving no political expression to diversity.⁴⁵ The pursuit of political unity and territorial integrity at the expense of ethno-linguistic and religious diversity has been a leading objective of African statecraft. For instance, ethnic parties are often outlawed; African states have consistently complied with OAU's principle of upholding colonial borders.

Nor is the postcolonial federal experience in Africa a happy story. Federation failed in francophone West (Cameroon), Ghana, and the Central African federations (Northern Rhodesia, now Zambia, Nyasaland, now Malawi, and Southern Rhodesia, now Zimbabwe)⁴⁶ and was aborted

⁴³ Watts (n 5) at 5.

⁴⁴ See for details Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study* (Nijmegen: Wolf Legal Publishers, 2006): chapter five.

⁴⁵ For long Nigeria was the only country in the continent that claimed to be federal. In many other African countries federalism is viewed as a means for disintegrating the state. Nigeria is perhaps an exception but it certainly is not a happy case, as for most of its time, the federal system has been under military dictators, which goes contrary to the spirit of negotiation, the idea of federalism as a covenant and the division of power in federalism. As in most African cases, centralization of power made the federal promise a half reality.

⁴⁶ This federation lasted for a decade (1953–1963) but was not able to forge genuine unity in diversity between the whites and the blacks. It was rather a federation based on the supremacy of the whites. The situation in southern Rhodesia was particularly acute (white

in East Africa (Kenya, Tanzania, Uganda). Several factors are accountable for this. In many of these federations, it was the outcome of a former colonial power bequeathing it as a means of maintaining links after independence with little support from inside. It is very much interlinked with the colonial policy of 'divide and rule.' The units of colonial governments were often merely the product of historical accidents, of the scramble for empire, or of administrative convenience. As a result, the colonial political boundaries rarely coincided with the distribution of ethnic, linguistic or religious communities or with the locus of economic, geographic and historical interests. It is not surprising then that the federations established under this context were doomed to fail.⁴⁷ Imposing a federal solution goes contrary to the principle that a federal system is based on a covenant. This certainly is one of the biggest challenges to the success of a federation unless supported by wider section of the society.

In others it failed because the newly emerged federal system failed in the hands of strong one-man leadership (in the case of the attempted East African federation because of competition for power between President Nyrere of Tanzania, Prime Minister Obote of Uganda and President Jomo Kenyatta of Kenya) in general and the lack of commitment to the federal principle in particular. This certainly went contrary to the federal idea of dispersion of power among several decision-making bodies. Personal rule, one party system and big man are antithesis to federalism. Federalism is about vertical dispersion and creating multiple centers of power. Personal rule and big man do the exact opposite. Lack of sufficient common interests to hold the federation together as well as the lack of balance between the units and the federation also contributed to this failure.⁴⁸ Except in Nigeria, the failure of the federal experience resulted in centralized

minority notorious for its discriminatory laws against the blacks) compared to the other two. There was thus a tension by the two northern territories that southern Rhodesia's policy affecting the blacks will be extended to them who were slightly guaranteed with native paramouncy. Thomas Franck, 'Why Federations Fail?' in Thomas Franck ed., *Why Federations Fail: An Inquiry into the Requisites for Successful Federalism* (New York: New York University Press, 1968): 167–200.

⁴⁷ There is hardly any dispute that these federations were imposed by colonial forces. The French imposed such an arrangement in central and west Africa and the British in east and central Africa including Nigeria. Besides, they were also nation-state federations ill-suited to a multi-ethnic context. Ursula Hicks, *Federalism: Failure and Success, a Comparative Study* (London: The Macmillan Press 1978) at 4.

⁴⁸ Elazar (n 23): 240–244; Hicks (n 47): 16: 171–196; Franck (n 46).

unitary governments of one kind or another. In Nigeria, until the return of civilian rule in 1999, federalism remained a victim of military rule.

Thus federalism in Africa is often seen with a lot of skepticism and mistrust. One probable explanation, among others for such widely held skeptical views about federalism has been that political leaders of such a diverse continent thought too much delegation of authority might lead to polarization. This may in the end put territorial integrity at stake.⁴⁹ Others have suggested that while in the West after centuries of attempts to suppress claims of national minorities within the nation-state, there is a dramatic change towards accommodating them. In Africa the conditions that brought about the changes in the West are not favorably in place. In the west, after the end of the Cold War and with the expansion of NATO, the traditional fear by states that a national minority will conspire with a neighboring enemy state to facilitate invasion or annexation is not an issue and accommodating national minorities poses no risk to the basic geopolitical security of the state. Besides, in virtually every case of multi-cultural federalism in the west sub-state governments are subject to the same constitutional constraints as the central government. As a result, there is no fear that self-governing units will use their power, culture and religion to impose them on other minorities. In short, the threat of local tyranny is minimized, if not avoided.⁵⁰

In Africa, the security situation as well as the human rights condition, it claimed, is not favorable for generously granting minorities with a federal system in each of the respective countries. This is not without repercussions. The African state was maintained at a considerable cost. Monopolistic political arrangements such as military government, one party rule, systematic suppression of human and political rights were often rationalized as inescapable means of safeguarding unity. Yet ethnic diversity has not been banished. Bitter wars for secession as well as ethnic conflicts, at times amounting to genocide, were common in many parts of Africa. In general an attempt to forge political unity that disavows

⁴⁹ Goran Hyden, 'Electoral Systems and Political Reform,' in *Constitutionalism: Reflections and Recommendations, Proceedings of the Symposium on the Making of the New Ethiopian Constitution* (Addis Ababa: Inter Africa Group, 1993) at 9; See Andreas Eshete, 'Ethnic Federalism: New Frontiers in Ethiopian Politics,' in *First National Conference on Federalism, Conflict and Peace Building* (Addis Ababa: United Printers, 2003): 142–172.

⁵⁰ Will Kymlicka, "Emerging Western Models of Multination Federations: Are They Relevant for Africa?" in David Turton ed., *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective* (Oxford: James Currey, 2006).

diversity survives intact throughout most of Africa. This was further reinforced by the horrors in the former multi-ethnic communist federation of Eastern Europe and the former USSR. Economic dislocations, ethnic transfers and the cleansing that followed, created black spots on the federal image in the context of multicultural states. Federalism was viewed as a recipe for disaster. Yet, neither democracy based on individual liberty nor economic prosperity compensated the claim for accommodation of diversity. In Africa, as one author noted, the economic picture is bleak, democracy is often devoid of content, and there is unfair distribution of wealth among social, class or religious groups.⁵¹ No surprise, the South African (1996) and Kenyan (2010) constitutions adopt ‘devolution’ than federalism although both constitutions manifest significant federal features. Some political actors in both countries were sceptical to the idea of federalism and constitutional designers had to find a more friendly concept, devolution to mitigate concerns.

Federalism and devolution were articulated as alternative to end conflicts and as peace making instrument in the early 1990s. Within the African continent, it has been adopted in Ethiopia (since 1991/1995), South Africa (1996), Kenya (2010), Sudan (2005), South Sudan (2011) and Somalia (2012). Earlier on, modernization, liberalism, globalization and economic development were believed to absorb all sorts of diversity. But the ‘melting pot’ hypothesis and modernization at times simply reinforced rather than diminished forces of diversity. In situations where there is tension between those who want to maintain existing *status quo* and other forces that would like to restructure the state and even secede, federalism presents as a possible half-way solution accommodating both interests: maintain state integrity and unity while allowing sub units to enjoy political autonomy in a defined territory and fair representation in federal institutions. It has the potential to allow national minorities some measure of self-government within the contours of existing states.⁵²

⁵¹ Ruddy Doom, ‘International Setting,’ in *Constitutionalism: Reflections and Recommendations, Proceedings of the Symposium on the Making of the New Ethiopian Constitution* (Addis Ababa: Inter Africa Group, 1993) at 3.

⁵² John McGarry, ‘Federal Political Systems and the Accommodation of National Minorities,’ in Ann L. Griffiths ed., *Handbook of Federal Countries 2002* (Montreal and Kingston: McGill-Queen’s University Press, 2002) at 424.

2.3 FEDERALISM AND FEDERATIONS

Like many other concepts there is admittedly some difficulty in defining federalism. Within the context of the older federations, it might mean the joining together of some semi-autonomous units for some common goals. Within the context of the EU it might refer to the coming together of the bulk of European states and the emergence of new institutions combining confederal as well as federal features. Within the context of former communist federations, federalism meant the existence of some features associated with the division of powers in constitutional form but subject to centralized party decision making.⁵³ In the African context, federalism was associated with the colonial experience of divide and rule.⁵⁴ It might, therefore, mean different things to different people depending on historical and cultural context. Part of the explanation also comes from the fact that federalism has been the subject of study of different disciplines and scholars have been studying different aspects of the same concept.⁵⁵

Although earlier studies on federalism failed to make a distinction between federalism and federations,⁵⁶ it is common to observe such a

⁵³ Kincaid (n 37): 30–31; Duchacek (n 39) at 14.

⁵⁴ Riker (n 7) at 25.

⁵⁵ For instance K.C. Wheare emphasized more on the importance of the existence of commonly shared institutions among federations and his study has been criticized as too legalistic, see Wheare (n 17); Livingston on the other hand argued that the essential features of federalism are to be looked for, not in the shadings of legal and constitutional terminology but in the forces—economic, social, political and cultural—that have made the outward forms of federalism necessary. In short, federalism is a function of societies that is a territorially grouped diversity. Livingston (n 15): 84–87; still Blindenbacher and Watts acknowledging Livingston's contribution point out that it is also one-sided. They rightly contend that not only are institutions reflections of societies but once created they also influence the society that created them. One cannot deny the fact that the 1789 US federation, the 1848 Swiss federation and the 1995 Ethiopian federalism certainly were turning points in changing the political dynamic of the respective countries. In the two older federations by transforming confederations to modern federalisms and in the latter by restructuring the state based on federalism as well as on language. Raoul Blindenbacher and Ronald Watts, 'Federalism in a Changing World—A Conceptual Framework for the Conference,' in Raoul Blindenbacher and Arnold Koller eds., *Federalism in a Changing World: Learning from Each Other* (Montreal and Kingston: McGill-Queen's University Press, 2003): 12–13.

⁵⁶ For instance William Riker employs in his book 'centralized federalism' to mean federations and 'peripherized federalism' to refer to confederations, p. 5. William Riker also employs federalism to mean confederations, federations and the federal idea. 'The notion of federalism has existed from ancient times. Ancient and medieval federalisms

distinction. Preston King in his pioneer study conducted in 1982,⁵⁷ and following him, Ronald Watts and some others⁵⁸ for instance distinguish federations from federalism. According to this distinction, federalism refers to an ideology⁵⁹: a normative principle, while federations refer to institutions. Federation is descriptive concept referring to the actual system of governments.⁶⁰ Federalism as a political philosophy is essentially an organizing principle. Deeply rooted in the Latin term *foedus*, federalism refers to the ‘coming together of humans as equals to establish political bodies in such a way that all reaffirm their fundamental equality and retain their basic rights.’⁶¹ Perhaps this is a bit exaggerated in the sense of emphasizing too much on the equality of the partners to the federal bargain, but it is true that federalism is a compact (bargain) referring to the unity among constituent units, while at the same time retaining the autonomy of the entities.

succumbed rather quickly ... modern federalism has been notably successful’ in this short quotation one sees the use of federalism to mean three things: the idea, confederate states and federations. William Riker, ‘The Origin of Federal Government,’ in William Riker, *The Development of American Federalism* (Boston: Kluwer Academic publishers, 1987): 9–10. In the famous *The Federalist Papers* the word federal was synonymous with confederations. See George Carey, *The Federalist, Design for a Constitutional Republic* (Urbana and Chicago: University of Illinois Press): 97; Wheare (n 17): 9–10.

⁵⁷ Preston King, *Federalism and Federation* (London: Croom Helm, 1982).

⁵⁸ Watts (n 5) at 1; Michael Burgess, ‘Federalism and Federation,’ in Michael Burgess, *Federalism and Federation in Western Europe* (London: Croom Helm, 1986); Alain-G. Gagnon, ‘The Political Uses of Federalism,’ in M. Burgess and A. Gagnon eds., *Comparative Federalism and Federation* (London: Harvester, 1993); Douglas Verney, Federalism, Federative Systems and Federations: The United States, Canada and India,’ *Publius the Journal of Federalism* 25:2 (1995): 81–87.

⁵⁹ ‘Is to mean the recommendation and sometimes the active promotion of support for federation. It is ideological in the sense that it can take the form of an overtly prescriptive guide to action.’ Federalism seeks federation but to achieve diverse ends and values. In the real world, the commitment to federations represents more a response to specific interests and problems than does a general ideological desire to achieve some abstract notion of democracy or freedom. Federalism has been examined as a political ideology in the sense that it reflects values and benefits, which recommend specific forms of federation. The particular type of federation prescribed is determined by the interests that the framers and the actors want to achieve. Thus, federalism is not as such a universal value. See for more Michael Burgess, ‘Federalism as Political Ideology: Interests, Benefits and Beneficiaries in Federalism and Federation,’ in M. Burgess and A. Gagnon eds., *Comparative Federalism and Federation* (London: Harvester, 1993): 102–113.

⁶⁰ King (n 57) at 74.

⁶¹ Elazar (n 23): 2–7.

Federalism as an organizing principle advocates a 'multi-tiered government combining elements of shared-rule through common institutions for some purposes and regional self-rule' for constituent units for some other purposes, thereby accommodating unity and diversity within a larger political union.⁶² The essence of federalism as a normative principle is the perpetuation of both union and autonomy, in the latter for accommodating, preserving and promoting distinct identities within a large political union.⁶³

Federations on the other hand refer to tangible institutional facts. They constitute the institutional and structural techniques for achieving one of the goals of federalism.⁶⁴ Federations are used to describe actual systems of governments. Watts has introduced a third classification: federal political systems that according to him refers to a whole spectrum of more specific non-unitary forms of governments ranging from decentralized system of governments, federations to confederations, autonomy and beyond.⁶⁵ This term is also descriptive, which refers to a broad category of political systems, which somehow incorporate albeit faintly, the federal principle. In short, federal political systems suggest that there is more than one way to apply federal principles. Within such genus of political systems, federations represent one type of species.

The distinction referred to between federalism as ideology and federations as political institutions, should not, however, imply that the two are unrelated. Federalism as a normative principle no doubt influences

⁶² Blindenbacher and Watts (n 35) at 9.

⁶³ Watts (n 5): 6 and 17.

⁶⁴ King (n 57): 15–17.

⁶⁵ Watts (n 5) at 6. This broad concept called federal political systems refers to all sorts of multi-tier governments. Federations constitute one among them. Others include, federacies, associated states and autonomy. In federacies a smaller political entity is linked to a larger one, usually a former colonial power, but the smaller unit retains considerable autonomy, perhaps more than is constitutionally granted to constituent states in a federation, in return for a minimal role in the government of the larger one. It is based on a bilateral arrangement and is given to a part of a state hence creating asymmetrical self-government. Associated States refers to a more or less the same kind of relationship except that in this case the arrangement can be dissolved by either of the units acting alone. Autonomy refers to the exercise of political power by a sub unit within a unitary state while the rest of the country remains centralized one as in Zanzibar of Tanzania or Eritrea in the 1950s. See *ibid.*: 7–9; R. Watts, 'Forward: States, Provinces, Länder and Cantons: International Variety Among Sub-national Constitutions,' *Rutgers Law Journal* 31 (Summer 2000): 941–958.

the institution established in political reality. Indeed, it is not wrong to assume that federal institutions, to a certain degree enshrine an ideology, although such institutions may not necessarily and wholly reflect the norm on which they are based.⁶⁶ King has rightly remarked, ‘the normative orientation affects the institutions.’⁶⁷ He also remarks that there may be federalism without federations, but there can be no federations without some matching variety of federalism. Some form of federalism is always implicit in any given federation. This is to imply that federalism could still be manifested, for instance, in decentralized government forms, or confederal arrangements. This point hints to the fact that it remains as an important organizing principle of polities. But it is also important to note that the federalism behind it is often faintly reflected perhaps nothing more than the promotion of that degree of support for local units within a centralized polity.⁶⁸

There is no effort to discuss theories of federalism here except noting that it has two major origins: one in the USA and the other from continental Europe. Karmis and Norman wrote ‘theories of federation were formulated in response to the rise of centralized modern states and to the theory of sovereignty that came to support them.’⁶⁹ Older and loose Empires in Europe were weakening leading to centralized and absolute Monarchs. Jean Bodin and Thomas Hobbes provided the theory of centralized sovereignty in the sixteenth and early seventeenth centuries at the height of absolutist Catholic empires in Europe.⁷⁰ The theories of absolute state sovereignty were however challenged by other experts that theorized on a shared federative sovereignty based on ongoing political experiments like the Swiss and Dutch confederations. German jurist Johannes Althusius (*Politica* 1603, politics as the art of associating) and

⁶⁶ King (n 57): 74–75.

⁶⁷ Ibid.: 74.

⁶⁸ Ibid.: 76, Perhaps this explains why federations manifest themselves differently in different societies. It might also explain, albeit weakly, why federations change and develop over time in a certain way. Federations move; they change and in this process they may depart from the normative orientation. See also Michael Burgess, ‘Federalism and Federation,’ in Michael Burgess and Alain-G Gagnon eds., *Federalism and Federation: A Reappraisal Comparative Federalism and Federation: Competing Trends and Future Directions* (Hemel Hempstead: Harvester Wheatsheaf, 1993): 12.

⁶⁹ Dimitrios Karmis and Wayne Norman eds., *Theories of Federalism: A Reader* (New York: Palgrave Macmillan, 2005): 25.

⁷⁰ Hueglin and Fenna (n 33): 76.

German philosopher Samuel Pufendorf (*The Law of Nature and Nations* 1672) were among the pioneers of this alternative federalist approach. Both authors articulated the foundations for what later came to be known as *confederations* and later consociational European federations. This is the first and original conception of federalism (in today's vocabulary—confederation) as evolved in Europe. Its focus is on agreement among autonomous communities and consociational power sharing. Its actual institutional manifestations might take confederation or consociational federation.⁷¹

We should bear in mind that the concepts confederation and federation were interchangeably used and articulated as alternative to centralized nation state until the establishment of the US federation in 1787 where federal system emerged as distinct form of political organization separate from a confederation. The Articles of Confederation (1781) were found to be inadequate by the founding fathers and following series of debates in Philadelphia dropped it and designed the first modern federation. The authors of the *Federalist Papers* XXXIX (Alexander Hamilton, John Jay, and James Madison—known by their pen name *Publius*) highlighted how the new entity they designed is different from its predecessor—the Articles of Confederation. This came to be known as the American model (1789) that influenced several other federal systems so much so that K. C. Wheare, the first known author on Comparative federalism considers the American system as a model against which others are compared and analyzed.⁷² The focus of the US federalism is in its complicated system of checks and balances also called the 'double security' where power is divided both horizontally (among the three branches) and vertically between the federal and state governments.⁷³ Federalism (in its original sense as in the EU or other loose global cooperation schemes) is also advocated as a means for ensuing global peace going beyond a particular federal state by Immanuel Kant's *Toward Perpetual Peace* (1795). In this respect, the UN and EU were established following the two major global wars (World War I and II).

Less discussed possibly third approach is the theory on economic federalism associated with Pierre-Joseph Proudhon (1809–1865). He

⁷¹ Ibid.: 85.

⁷² Wheare (n 17).

⁷³ Hueglin and Fenna (n 33): 91.

articulated federalism as an opportunity for ensuring both political and economic equality. As a left inclined thinker, he was aware that politics will be dominated by the economy and thus in as much as others focused on federalizing political power, he emphasized on economic federalism.⁷⁴ This is one of the early theories on fiscal federalism that insists economy and resources need to be divided between the federal and state governments. As the reality in many emerging federations show, allocating political power without accompanying fiscal resources makes the federal process incomplete and perpetuates central dominance over the states.

These are the major intellectual origins to the idea of federalism in a nut shell. Karmis and Norman rightly wrote ‘From the late 1780s on, the federal tradition evolved into two very different-and often opposed-schools or traditions of political thought: one dominated by the evolving American model; and the other continuing the older, and increasingly neglected, confederalist (European) tradition.’⁷⁵ It is vital to note that there are differences in the intellectual origins of federalism between Americans and Europeans. Americans as articulated in the *Federalist Papers* focus on the *federal union* created following the collapse of the confederation while Europeans focus on *the parties* that establish the federation as articulated by John Althusius which is communitarian and confederal with the EU being one of its modern manifestations.⁷⁶ As will be illustrated in Chapter 4 in detail this distinction remains critical in addressing one of the most complex issues of our time: how to manage diversity in deeply divided societies with politically mobilized cleavages—the American tradition advocating integration and the European approach focusing on accommodation, community autonomy and consociational power sharing. The Belgium and Swiss federations are classic examples.

Bearing this distinction in mind, the focus of the following section is principally limited to discussing some of the shared characteristics that

⁷⁴ Ibid.: 95.

⁷⁵ Dimitriou Karmis and Wayne Norman eds., *Theories of Federalism: A Reader* (New York: Palgrave Macmillan, 2005): 7.

⁷⁶ See Ferran Requejo, ‘Three Theories of Liberalism for Three Theories of Federalism,’ in Michel Seymour and Alain Gagnon eds., *Multinational Federalism: Problems and Prospects* (New York: Palgrave Macmillan, 2012): 57.

one can find among federations. In the process of discussing those shared features, concepts like confederalism and decentralized systems are also considered for the purpose of conceptual clarity.

2.4 SOME COMMON FEATURES AMONG FEDERATIONS

There is admittedly difficulty in defining what we earlier noted vaguely as federations. Like many concepts and institutions, federations are in a process of change and the ways they manifest themselves in different polities far from the same. Making things worse, governments called federations have existed and continue to exist in such an overwhelming variety of forms that any attempt to include every one of them runs the risk of encompassing virtually any kind of government. Some are old and mature, while others new. Some are the results of coming together in which semi-autonomous units deciding to establish a federal government in which in the formative years one finds strong states and weak/young federal government. Others are holding together type where a previously unitary state for political and other reasons decides to transfer power to states. During the formative years holding together federations emerge with strong center and new states although that might change across time. Some are parliamentary and others presidential. Some are democratic, others not. Some follow dual structure allocating competencies to both levels of governments while others are cooperative where law making is mainly at the federal level while implementation left to the constituent units. The purpose of the federations also differs. Some are homogenous and thus aim to merely disperse power both horizontally and vertically while other aim to accommodate mobilized ethno national groups and thus the constituent units aim to empower sub state identities. The role, power and composition of the second chamber also differ. All these variables have impact on the performance of the federations. Despite such wealth of variation, many continue to speak and write about federations believing that they share certain common characteristics. The purpose of the following section is part of the exercise in search of common features among some federations.

2.4.1 *Division of Power*

No one contends the fact that federations are distinguished from other polities primarily by the fact that political power (commonly related

to legislative, executive, judicial and financial functions) is constitutionally divided between the federal government and the states, and that both orders of government are autonomous with respect to the powers granted to them. This is indirectly based on the dual principle implicit in every federation of the desire to be united and to be autonomous. A common feature among federations has been the existence of, powerful motives to be united for certain purposes, on the one hand and deep-rooted motives for autonomous states for other purposes, on the other. This underlying notion of federations has implications on the design of federations through distribution of powers.⁷⁷ The federal government is often empowered with those powers that are shared in common that promote unity and the states with those powers considered relevant for the expression of regional identity, hence the famous expression that defines federations as shared rule through common institutions and self-rule for constituent units. Through the former, one of the cardinal values, unity is promoted and through the second, the other cardinal value, diversity is equally promoted.⁷⁸ It is important to emphasize that in federations, the units are not only entitled to regional self-rule or administration by right but they also share in the process of common policy-making at the center.⁷⁹ The principle of power sharing inherent in federalism implies shared competencies and shared institutions through which the constituent units are accorded the right to be included in policy-making at federal level. Institutions are set up to protect the existence and authority of both orders of governments.⁸⁰ As will be illustrated in the next chapter, the notion of power sharing is not well-entrenched in the federal system in Ethiopia. In general, however, it appears that the constitutionally guaranteed division of power between the federal government and the states, in which both exercise their power autonomously within their own spheres, is a settled principle identifying federations from other forms of government.

⁷⁷ Watts (n 5) at 17.

⁷⁸ Ibid.: 17, 35.

⁷⁹ Elazar (n 23) at 6–7.

⁸⁰ Watts (n 5) at 17.

2.4.1.1 *The Notion of Co-ordinate Relationship*

There is an endless debate as to whether in federations, in which power is divided between one center and perhaps two or more states, the relationship between the center and the states is *co-ordinate*, *balanced*, only *autonomous*, or even at times *subordinate*. The traditional thinking as presented by K. C. Wheare in his pioneer work states as follows: in federations 'the constitutional division of power between the center and the states creates a relationship that is co-ordinate [co-equal] rather than a subordinate one.'⁸¹ Although many have criticized his work as too legalistic, in actual fact he developed the idea of co-ordinate federal-state relationship from the unity-diversity combination deeply engrained in the federal principle. The following paragraph clearly illustrates this point.

It is important that the units in a federation should have produced for themselves stable governments with some history and tradition of working in the regions and with some roots in the people. Yet, this factor needs to be nicely balanced in the sum of forces at work in the union. People must have an established government to which they can be attached, but that attachment must not be too strong. Therein lies always a possible source of weakness in federal government that state loyalty may prevail over general loyalty. More likely is this to be true where state boundaries coincide with racial, linguistic or national boundaries. It is obviously an advantage that the units in a federation should be homogeneous, as it creates a feeling of common attachment to the new states: nothing strengthens a regional government so much. But the danger is that the region may insure a loyalty greater than that of the union and that in time of conflict the union may fall apart. *That the two loyalties must be there is the pre-requisite of federal government, but that one should not overpower the other is also a pre-requisite.*⁸²

In short his thesis is that there should exist a balance between the forces of unity and the forces for diversity. That the two forces should be co-equal (co-ordinate) and one should not prevail over the other.

⁸¹ Wheare (n 17): 1–2; Ronald Watts also subscribes to this approach. He states: 'federations represent a particular species in which neither the federal nor the constituent states of government are constitutionally subordinate to the other'. Ibid. at 7.

⁸² Ibid.: 50–51 (emphasis by the author). Livingston states: 'the difference must not be too great, else the community may break up into independent groups. Federalism cannot make coherent a society in which the diversities are so great that there can be no basis for integration.' Livingston (n 15) at 89.

Ronald Watts's study of post war commonwealth federations equally reinforces the importance of not only the dual loyalty to unity and diversity but also the point that there should exist a balance between the two.

Two features stand out as common to them all. First, the geographical distribution of diversity within each of these societies with the result that demands for political autonomy were made on a regional basis and second, there existed at one and the same time powerful desires to be united for certain purposes. There existed the duality of demands for union and regional autonomy and the relative *balance* or *equilibrium* in each between the conflicting forces for unity and diversity.⁸³

The origin of this co-ordinate theory seems to go back to Hamilton's essay on *The Federalist Papers* No. 34.⁸⁴ Responding to the question on the position of states in the US Constitution, Hamilton wrote 'all apprehensions on the score of usurpation ought to be discarded. The general powers of the new government are limited and in all un enumerated cases the states would be left in the enjoyment of their *inviolable sovereignty* and independent jurisdictions. As for those areas where sovereign power is divided, the states would continue to enjoy *coordinate authority* with the national government.'⁸⁵

⁸³ Ronald Watts, *New Federations: Experiments in the Common Wealth* (Oxford: Clarendon Press, 1966): 92–93. Hereinafter called *New Federations*.

⁸⁴ The *Federalist Papers* consist of 85 essays written in 1787 and 1788 by James Madison, Alexander Hamilton and John Jay. Their purpose was to convince the limited electorate of New York to vote for the new constitution. *The Federalist* No. 34 in Roy Fairfield ed., *The Federalist Papers*, 2nd edn (Garden City: Anchor Books, 1966): 88; see also Davis (n 36) at 85.

⁸⁵ Davis (n 36) at 85. Yet one needs to note that these papers were written to pacify the fears of those who opposed the move towards centralization. Otherwise Davis, who has made a comprehensive review of the authors of *The Federalist Papers*, wrote, 'from the outset and almost to the very end of the Philadelphia convention, the attempt to explain the relationship of the national government to the states, even by those most ready to compromise on almost everything but the idea of national government was translated in the language and analogy of hierarchy, primary/subsidiary, supremacy/inferiority, independent/dependent, general/limited power. Rarely if at all were the states spoken of as coordinates or co-equal institutions.' Besides, *The Federalist Papers* is, a work of 85 papers manifesting partisan as well as the personal positions of the victors of the convention, the chief ones being Hamilton and Madison. See for instance, *The Federalist Papers* No. 14, where Madison states, 'it is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects which concern all the members of the republic but which

As can be observed, behind the more formal approach of constitutional division of power between the federal government and the states is the federal idea of unity-diversity combination, a combination so complex that it can manifest itself in many ways. It is true that a federation is born when the political units in a state possess some element of diversity or identity which create in them the desire to maintain an autonomous existence, while at the same time there are certain factors of vital importance that all these units share in common and for which matter they desire a united existence. This presupposes two essential conditions for federations. First, the units involved must have many interests in common because of which they are convinced that there is good reason to unite and secondly, the units also possess by virtue of historical, political, social, cultural, linguistic, economic or other factors of diversity, the desire to look for an expression of their diversity. As far as those elements considered vital for the continuity of diversity are concerned, they are not ready to forgo their right to be different. They retain their autonomy in respect of matters in which they differ from one another.⁸⁶ But this does not say much about the relationship between the two.

Reinforcing the co-ordinate principle Dikshit states:

Faced with the circumstances of commonly shared interests among the states for which they are ready to assign to the federal government, and diversity in terms of cultural, historical, linguistic or economic, which they want to retain, the units enter into a compromise to create a half-way house between complete unity and complete separation and a federation results. The basic problem of federations has traditionally been for the federations to keep the centrifugal and centripetal forces in *equilibrium* so that neither the planet states shall fly off into space nor the sun of the central government draw them into its consuming fire.⁸⁷

G. Smith has also reiterated the idea of federalism as a doctrine of balance aiming at finding equilibrium between forces of centralization and decentralization. The federal idea in short is generally conceived as a

are not to be attained by the separate provision of any of the subordinate governments'. Ibid.: 85, 26, 46.

⁸⁶ Dikshit (n 36) at 219.

⁸⁷ Ibid.: 4, 219.

compromise, between unity and diversity, autonomy and sovereignty, the national and the regional.⁸⁸

The constitutional division of power between the federal government and the states is part of the design to erect a common central government for purposes that are best served in common, but at the same time also demand institutions that maintain local decision-making and guarantee autonomy in respect of matters that are served best by such autonomous units.⁸⁹ The duality resulting from unity and diversity is the one driving factor for politics that consider federations as institutions forging the two together. If this is translated into a constitutional formula, the shared interests among the states are assigned to the federal government during the federal bargain and the elements of diversity, which could be manifested in many ways in each federation and for which the states want to retain autonomy, are left for the states in the same process. Federations in theory are then expected to reflect this unity-diversity combination among others in the constitutional division of powers and because the two have to be balanced or that one should not have power over the other, the case for the co-ordinate relationship between the federal government, representing the forces of unity, and the states, representing the forces for autonomy emanates.

Preston King on the other hand contends that federations, although based on the ideology of unity from diversity, are rather fashioned to signify some kind of imbalance, more specifically, to establish federal supremacy, than a co-ordinate or balanced relationship between the center and the states.⁹⁰ His point is simply that the co-ordinate theory is theoretically less convincing and is contradicted by federal practice.⁹¹

⁸⁸ G. Smith, 'Mapping the Federal Condition: Ideology, Political Practice and Social Justice,' in Graham Smith ed., *Federalism: The Multi-ethnic Challenge* (London: Longman, 1995): 5–6.

⁸⁹ Dikshit (n 36) at 219.

⁹⁰ King (n 57): 59–60, 113–120; despite this generalization, however, John Kincaid argues that there are bound to exist differences in emphasis on either unity or diversity depending on several factors. It all depends on the values the federal system wants to achieve. In some cases the values to be achieved may lean towards diversity, which opposition may label separatism or may lean towards unity which opponents may label centralism. Kincaid (n 37) at 32.

⁹¹ King (n 57): 20–21.

2.4.1.2 *Limitations to the Co-ordinate Theory*

It may be theoretically easy to state that federalism as an ideology of balance between unity and diversity guides the working of federations. Political power may be best to a federation if kept checked between the two opposing forces of centralization and decentralization. But we observe two major trends depending on the design and purpose of the federation. Most homogenous federations as a matter of federal constitutional law and federal practice establish the federal government having some predominance over the states. Thus most federal constitutions state that in case of contradiction on joint mandates (concurrent and framework powers) federal law takes precedence over state law.

Dikshit, who expounded and extensively reviewed the concept of co-ordinate relationship between the federal government and the states, has in the end admitted, albeit hesitantly, that although the balance is a necessary prerequisite, it should be so that the forces for unity slightly dominate over those for autonomy. The states merge into a federation only when the centripetal forces in some sense prevail over the centrifugal ones. If the communities involved are not prepared to submit themselves to an independent government, they have not achieved the federal requisite of having common interest, for which they entrust upon the central government.⁹² William Riker too states, ‘the desire for either protection or participation [two reasons he considers vital for uniting within a federal system] outweighs any desire they may have for independence.’⁹³ Of course this does not imply that the operation of the forces of unity and diversity perfectly concur with the formal and constitutional structure. The appeal of federations and federalism in the modern world owes much to its capacity for evolution. Depending on the combination of the factors for unity and diversity, the nature of the resultant federation may differ in operation but as far as the constitutional design is concerned, in most homogenous federations federal law takes precedence over state law in case of conflict on joint mandates.

With heterogeneous federations that attempt to accommodate politically mobilized ethno national groups such as Canada and Belgium, the relationship between federal and state law with respect to joint

⁹² Dikshit (n 36) at 220.

⁹³ Riker (n 7) at 13.

mandates is much more complex compared to homogenous federations. In Canada, for example, there are cases where provincial law may take precedence over federal law in some matters considered crucial for the French speaking state of Quebec.⁹⁴ In both federations, centrifugal forces have across time pushed for more transfer of power from the federal government to the constituent units often through a complex process of negotiation. Thus while one observes trend of centralization in homogenous federations, it is the reverse in heterogeneous federations.

2.4.1.3 *Confederations*

Essentially, it is the constitutionally guaranteed autonomy of both the federal and state governments and their ability to act directly upon the citizens that distinguishes federations from other looser forms of alliances like confederations. The latter permit joint actions regarding some matters but the allied governments retain full authority. It is good to note that in confederations, the states retain almost the whole of their sovereignty, not only in their own independent jurisdiction but also even in those powers assigned to the center. There is no single and independent executive as such except the group of state delegates and the decision-making procedure too is designed to preserve the sovereignty of the state governments, requiring either unanimity or a qualified majority.

The two oldest confederations are the confederation of the Provinces of the Netherlands that survived for two centuries (1581–1795) and Swiss Confederation (1291–1803) before it was annexed by Napoleon.⁹⁵ The short lived United States confederation or the Articles of Confederation as it is called (1776–1789), incorporated the idea of division of powers but the locus of sovereignty remained with the states. Indeed, Congress was authorized with a list of powers, but the exercise of such powers at the center was dependent upon the states. It was composed of delegates appointed by each state. The delegates were not only appointed by the states but also *recallable* before the year of office expired. Furthermore, the states maintained the right to fully instruct their delegates. The concurrence of the states was also necessary not

⁹⁴ See Watts (n 5): 87.

⁹⁵ Hueglin and Fenna (n 33): 20.

only for the passing of major decisions but also for the subsequent execution.⁹⁶

Consistent with other forms of earlier alliances, the power of Congress was completely dependent on the state-appointed delegates. The states made Congress complete servant of their will. Not only was independent central government absent, but except the few less important powers that could be decided by majority, the majority of the issues needed the approval of a qualified majority (9/13) and the overall structure reveals that 'Congress could make treaties but could not persuade the states to honor them; it could authorize foreign trade but could neither regulate nor tax it, it could call for money but not collect it, borrow money but not repay it, print money but not support it.'⁹⁷ The real trouble arose out of the states' desire to retain their supremacy. An extraordinary majority was required for decisions on foreign affairs, the military, and borrowing which means that five states could veto. In short, the real decision on important matters was pushed back from Congress to the states.⁹⁸

In short, the principle of organization upon which the confederation was based was that of subordination of the center to the states. As a result, the central government had no direct authority to act upon the people.⁹⁹ Emphasizing the retention of almost complete sovereignty by the states Hughes defined confederations as 'the sharing of any institutions of government between two or more unitary states.'¹⁰⁰

It was the inadequacy of this arrangement that led to the federal Constitution of 1787. Indeed, the modern idea of federations was invented at the famous convention in Philadelphia (May–September 1787).¹⁰¹ The convention made a substantial leap forward from the loose

⁹⁶ Wheare (n 17): 3–4. After Independence on July 4, 1776 the thirteen American States established on November 15, 1777 the Articles of Confederation that were later replaced by the 1789 federal Constitution.

⁹⁷ Davis (n 36) at 75.

⁹⁸ William Riker 'The Invention of Centralized Federalism,' in Riker ed., *Development of American Federalism* (Boston: Kluwer Academic Publishers, 1987) at 18.

⁹⁹ Wheare (n 17): 3–4.

¹⁰⁰ C. Hughes, 'Cantonalism: Federation and Confederacy in the Golden Epoch of Switzerland,' in M. Burgess and C. Gagnon eds., *Comparative Federalism and Federation* (London: Harvester, 1993) at 155.

¹⁰¹ Riker (n 98) at 18. According to Riker 'as practical men, federalism, the result of the convention was an unanticipated consequence of practical judgment of the founders.

forms of alliance to the system of government widely known today as federation.

The pivotal actors in bringing about the Philadelphia convention were the Virginians, who had already started to amend the Articles of Confederation. They submitted their plan, which became the basis not only for the discussion but its revised plan ultimately became the United States Constitution. The plan provided for a government of three branches, somewhat independent of each other and each endowed with national authority; a two-house legislature subject to a conditional veto by an executive, and an independent judiciary. Indeed, according to Riker, there was nothing federal about the Virginia plan, the goal of the Virginians was to establish a centralized unitary government.¹⁰²

However, as the convention proceeded, the Virginia plan was revised on crucial points owing to the insistence of the confederal forces threat of withdrawal. Among others the plan was reversed, on first, the representation of the states: the Virginia plan proposed proportional representation based on population, while others insisted on the equal representation of states, an idea reminiscent of the Articles. The issue of whether states were to be represented equally or according to population was settled by a grand compromise. Proportional in the lower house and equal in the upper house (Senate) and at this point the idea of preserving the states was somehow injected into the new system.¹⁰³ The second point was the manner of election of the upper house. Here, too, the principles of the Articles were retained as indispensable. Thirdly, there was an urge for overall central government veto over the states which was moderately settled with the inclusion of the supremacy clause.¹⁰⁴

The compromise between the forces for unity and for states' rights was motivated more by practical expedition to save the union from dissolution than the intention to improve the confederation. It is hardly possible to attribute the conventions success as something resulting from the intent to create federalism. They were intending to centralize power at the expense of federalism, not to preserve federalism at the expense of centralization. The invention resulted in the process of trying to transcend the limits of the alliance, and after series of compromises.' *Ibid.*: 40–41.

¹⁰² *Ibid.*, at 22. On the other hand, the New Jersey Plan provided for something close to the Articles of Confederation, only with minor improvements.

¹⁰³ *Ibid.*: 30.

¹⁰⁴ *Ibid.*: 36.

What came out of the convention was a compromise resulting in the birth of the first federal system. The states remained politically significant and the Senate remained a major institution in this respect.¹⁰⁵ The tension between the two plans, the Virginia plan which called for a radical cure to the Articles calling for national government and the New Jersey plan which insisted on some adjustment to the Articles, led to a practical compromise. The final document read on the last day of the Convention (September 17, 1787) was in every sense a bundle of compromises, a mosaic of second choices on almost everything except the establishment of the national government.¹⁰⁶ The federation was a compromise between those who advocated for retention of state rights and those who advocated for a more centralized government.

As to the contributions of this convention Davis states:

What is minimally understood of the 1787 model is this: that the burden of state is divided between two popularly elected governments: the national and the states, the national government is equipped with a bicameral legislature based on the two distinct principles, that of population representation and territorial representation; it incorporated the principle of duality under a single constitutional system of two distinct governments: national and state, each acting on its own right directly on the citizen; that subject to the provisions of the constitution each government is free to act independently or in concert with the other; that judicial disputes between the national government and the states will be settled by the courts; that the national supremacy will prevail where two valid actions national and regional are in conflict; that the pact is contained in a written constitution; and lastly the constitution is a fundamental law, changeable only by a special procedure.¹⁰⁷

The shift from confederation to federation was however never clear at the outset. Indeed, even after the end of the convention, some continued to consider the new arrangement a continuity of the Articles of confederation, an agreement between sovereign states, and others as the birth of a new polity, entirely different from its predecessor. The tension between

¹⁰⁵ *Ibid.*, at 40.

¹⁰⁶ Davis (n 36) at 114.

¹⁰⁷ *Ibid.*: 93, 122.

the two thoughts continued until it was settled by war in 1865.¹⁰⁸ The move towards a new form of government distinct from the confederation was advocated strongly by the great authors of the Federalist camp, Alexander Hamilton, John Jay, and James Madison otherwise known by their pseudonym *Publius*. The three authors undertook a massive campaign of convincing the people that the new constitution was based on a different principle from its predecessor. The chief burden of *The Federalist* was to convince the people of the need for centralized federalism as they called for a closer union, or greater centralization than the one, which existed before.¹⁰⁹

A similar central government dependency on the states existed under the Constitution of the German Empire of 1871–1918, or the Bismarck confederation, as it was widely known.¹¹⁰ This confederation was a compromise between those effecting French centralism and traditional German disunity, with twenty-five German states (princes). Prussia with about two-thirds of the territory and three-fifths of the population dominated the Bismarck *Reich*.¹¹¹ The constitution was silent on who should administer federal law. For reasons of political expediency and economy, Bismarck delegated administrative tasks to the states.¹¹² In principle legislative power was vested in both houses. The lower house consisted of 397 members elected by universal suffrage, Prussia alone sending 235 representatives to it. Its power extended to all legislative measures and had a five-year term but it could be dissolved earlier by the emperor with the consent of the upper house. The latter consisted of fifty-eight members of which Prussia alone claimed seventeen. Fourteen negative votes could veto a measure and hence Prussia alone could block any unwanted move. The members were more or less delegates appointed by the states and they voted according to the instruction of their governments, hence all the delegates of a state had to cast their votes similarly on the same question. The Council was thus dependent upon the state governments in

¹⁰⁸ Wheare (n 17) at 3.

¹⁰⁹ King (n 57) at 24.

¹¹⁰ Wheare (n 17) at 7.

¹¹¹ Arthur Gunlicks, 'State (Land) Constitutions in Germany,' *Rutgers Law Journal* 31 (Summer 2000) at 972.

¹¹² *Ibid.*, at 972; the system is called executive/administrative federalism and is still the dominant feature of the German federation.

general and on Prussia in particular, for Prussia not only commanded seventeen votes out of fifty-eight, but the King of Prussia was the German Emperor and had the authority to appoint the imperial chancellor. The prime minister of Prussia was the imperial chancellor and the president of the Council of the confederation.

As stated earlier, the member states had no equality of status whether in the Council of the Empire or in their internal administration, Prussia overshadowing all. There was a strong legislative centralization in the empire with an executive decentralization. The central government could legislate on all matters, but all laws were executed by officers of the states, there being no system of federal officers. The empire did not exercise direct authority over the whole population.¹¹³ World War I destroyed that regime, which was replaced by the federal Weimar Republic. The 1918 Weimar constitution marked the transition to a parliamentary form of government. In 1933 the Länder parliaments were formally abolished by the Nazi government and Germany became a centralized unitary state.¹¹⁴ Needless to say, Hitler abolished federalism along with all other German liberties, all of which were restored to Western Germany in 1949, following the end of World War II.¹¹⁵

¹¹³ Ibid.: 47.

¹¹⁴ Some contend that except for the years from 1933 to 1945 the political landscape of Germany always had a federal [confederal] structure. Martin Rogoff, 'The European Union, Germany, and the Länder: New Patterns of Political Relations in Europe,' *Columbia Journal of European Law* 5 (Fall 1999) at 417.

¹¹⁵ Elazar (n 23) at 132. Following WWI and the Revolution of 1918, 421 delegates to an assembly elected by universal suffrage, met at Weimar to frame a constitution. In the actual task of framing the constitution there were two parties with opposing views as to the position of the states. One wanted to wipe off the states and establish complete centralization and the other wanted to retain the separate character of the states with the only stipulation of curbing the power of Prussia. A compromise was reached between the two views and a federal constitution was drawn up and adopted by the Assembly on July 31, by 262 votes against 75 and came into force on August 11, 1919. With the coming to power of Hitler as a chancellor of Germany in 1933, the old battle on the division of power revived owing to the conception of the Empire as a federation or a unitary state with decentralized power to the states came close to complete centralization of power at the center. Officially, the states' sovereignty came to an end in 1933 and they were converted to mere subordinates. After the defeat of Germany in WWII, the Allied powers divided it into occupation zones under the US, UK, France USSR and later formed the Republic of Germany with a parliamentary system of government. Ibid.: 51–54. The decision to establish a federal system in West Germany was not entirely an indigenous determination seeking to provide a genuine democratic foundation; the Allies

Irrespective of some of the peculiar natures of the United States and German confederations, in both cases the central government lacked the capacity to act directly upon the people. Only the states can act directly upon the citizen. Confederations are organized on the principle of subordination of the common government to the states. Indeed, as Wheare stated, the indirect authority of the center over the citizen through the state governments is merely an illustration of this principle of subordination.¹¹⁶ As always, confederations occur when several pre-existing polities join together to form a common government for certain limited purposes such as foreign relations and defense, but the common government is dependent upon the states. Modern federations as we understand them today guarantee the independence and viability of the federal government such that its officials are enabled to decide on matters reserved to them, without the pressure from the states. The federal government governs directly the citizens who chose them with respect to the mandates allocated to it. It is this relative independence of the federal government from the states that differentiates federations from confederations. In the latter, the common government officials were in one way or another forced to refer decisions on some matters to state governments.¹¹⁷

The whole point reinforces the idea that federations are capable of effective action and capable of creating a citizen loyalty. In confederations states by constitutional right take part in central decisions, direct the

had decided quite early that there should be no concentration of power in the country. See Dikshit (n 36) 34 at 150. With unification on October 3, 1990, came the debate on the mechanism of unification and the status of the Basic Law (it was viewed as temporary text in 1949): between those who advocated unification under Article 146 that stipulated for unification of Germany via a new constitution approved by a referendum and those that forwarded the unification scheme to be conducted under Article 23 (which in essence meant the Länder in East Germany apply collectively to join the Federal Republic). The latter option was pursued and as a result the Basic Law continued to serve for the whole of post-unification German polity. Watts (n 5) at 26; see also Arthur Gunlicks, 'State (Land) Constitutions in Germany,' *Rutgers Law Journal* 31 (Summer 2000) at 971. For a more detailed account of the process of unification and the new challenges in the German federation see Charlie Jeffery ed., *Recasting German Federalism: The Legacies of Unification* (London: Pinter, 1999).

¹¹⁶ Wheare (n 17) at 15.

¹¹⁷ William Riker and Ronald Schaps, 'Disharmony in Federal Government,' in Riker ed., *Development of American Federalism* (Boston: Kluwer Academic Publishers, 1987): at 75.

voting of their delegates to the center, control its policy, confirm federal decisions. These states usually retain the primary loyalty of the citizen.¹¹⁸

Asymmetry and Autonomy (Federacy)

Within the rich comparative federal studies two concepts are also deployed as a means to manage conflicts. One is asymmetry, an institutional and constitutional arrangement in a federation that grants a particular subunit more autonomy compared to other constituent units. In other words, different sub units of the federation enjoy different levels of autonomy. This may be so because a particular region or ethno national group for historical and political reasons makes a stronger claim for accommodation compared to other parts of the country and the center concedes with a view to mitigate threats of secession. In Canada, the French speaking province has over a long period of time made distinct claims separate from the English speaking provinces. It should be mentioned that asymmetry emerges predominantly in a federation. While not formalized, Ethiopia's federal practise as well manifested asymmetric tendencies since 1995. The distinction between core EPRDF (Oromia, Amhara, Tigray and the South) vs. peripheral regional states (Afar, Somali, Benishangul Gumuz and Gambella), the role the then Ministry of Federal Affairs had over the latter and the way the Southern state was organized until it fragmented into several states after 2018 show this reality.

Autonomy (Federacy) is an institutional arrangement in an otherwise unitary state that grants self-government mandate to a particular region or ethno national group. The region that enjoys self-government has often little role in the larger unitary state (shared rule is not entrenched and thus the autonomous unit is not tied to the center making the former vulnerable to decisions being made in its absence) and yet the autonomy of the self-governing, unit unlike decentralized unitary state, cannot be dissolved unilaterally by the center. The relationship between the central government and the autonomous unit can only be dissolved by mutual consent. As is the case in South Tyrol and Åland Islands, outside actors also are involved in ensuring the autonomy of the Federacy. Autonomous arrangements exist in Åland Islands (with Finland), South Tyrol of Italy,

¹¹⁸ W. Riker, 'The Senate and American Federalism,' in Riker ed., *The Development of American Federalism* (Boston: Kluwer Academic Publishers, 1987): 136–137.

in Philippines and Indonesia (Aceh, East Timor before secession).¹¹⁹ There is significant variation in the level of autonomy provided to those that claim it and the absence of power sharing scheme at the center makes it less attractive compared to a federation.

2.4.1.4 *Decentralized System of Government*

As opposed to confederations, in decentralized governments the units, often called local governments, are subordinate to the center. Besides, in decentralized systems, the emphasis is on self-rule rather than on shared rule. In a federation on the other hand, the division of power is constitutionally guaranteed and the states are not creations of the federal government. Both the federal government and the states derive their authority from the federal constitution and as a result neither level can change the terms of the compact as enshrined in the constitution.¹²⁰

There is a lot of use and misuse of concepts of decentralization and local government in literature.¹²¹ Traditionally decentralized systems within unitary states are compared with federations. In general decentralization refers to the transfer of power from the center to sub state units, the latter enjoying some level of political, fiscal and administrative autonomy.¹²² However the transfer of power may or may not have constitutional backing. In decentralized unitary systems, the transfer of power from the center to local governments is not necessarily entrenched in a constitution. Local governments are often creations of the centre by a statute and are thus subordinate to it.¹²³ The arrangement presupposes the existence of central authority, which may for one reason or another transfer a portion of its authority to the local governments but such transfer is subject to *unilateral withdrawal, amendment or revocation* by the centre. The centre's decision to end the local units merely requires the passage of legislation. The number, boundary and power of the decentralized units remains under the prerogative of the center.

¹¹⁹ Anderson (n 19): 220.

¹²⁰ Elazar (n 23) at 35.

¹²¹ For the different meanings on decentralization see Markus Bockenforde, *A Practical Guide to Constitution Building: Decentralized Forms of Governments* (International Institute for Democracy and Electoral Assistance, 2011): 4; compare with Watts (n 5): 9.

¹²² Jean-Paul, Faguet, 'Decentralization and Governance,' *World Development* 53 (2014): 2–12.

¹²³ Watts (n 5): 9.

In a federation on the other hand, the division of power is constitutionally guaranteed and the states are not creations of the federal government. Both the federal government and the states derive their authority from the federal constitution and as a result neither level can change the terms of the compact as enshrined in the constitution. There is thus an important difference between the two types of transfer of powers. Decentralized unitary systems do not have the legal safe guards necessary to curb undue political interference on their autonomy from the centre.¹²⁴ When the transfer of power takes the form of a federation entrenched in a constitution, the federal government cannot interfere on the list of powers transferred to the states. Besides, there is often a legal guarantee in the constitution that protects the mandate of the states when encroachments materialize.¹²⁵

While older federations such as the United States, Switzerland and Canada remained silent making local governments creations of the states, post WWII federal constitutions such as the German Basic law of 1949, South Africa's post-Apartheid constitution and India's 1992 73rd and 74th amendments to its constitution have included the powers and status of local governments thus giving local governments an entrenched status. It has thus become common to speak of a 'multilevel government' in federations.¹²⁶ Thus local governments could also be constitutionally entrenched. Their autonomy is backed by the constitution and they enjoy some element of political, administrative and fiscal autonomy over the powers allocated to them by the constitution.

When local governments are constitutionally entrenched or when they enjoy political autonomy in practice, as manifestation of their autonomy they often tend to have elected institutions. It means there is transfer of political power to *self-governing* elected institutions such as villages, municipalities and districts.¹²⁷ 'Local institutions of democracy are the most accessible locations for political skills to be acquired and practiced and that local democracy not only provided greater opportunities for

¹²⁴ Bockenforde (n 121): 7.

¹²⁵ Watts (n 5).

¹²⁶ Nico Steytler ed., *The Place and Role of Local Government in Federal Systems* (Konrad-Adenauer-Stiftung, 2005): 8.

¹²⁷ Bockenforde (n 121): 2.

political participation but also is an instrument of inclusion.¹²⁸ This fits well into the argument that ‘local governments are embodiments of local democracy.’¹²⁹ Politics becomes accessible to the local people and local governments come to be arenas for political participation of the citizen at the grass root level. They serve as instruments for empowering the local population through direct or indirect participation. Local governments provide avenues to the citizen for engagement in public affairs at the local level. Such institutions allow the voter to influence policy and decision making at the local level to determine the nature and quality of services to be provided at the local level. In the *autonomy* model, local governments thus become agents of the voter and not of the upper level. Elected institutions serve as a representative and deliberative body with responsibility for approving local laws, regulations, for scrutinizing the local executive and for approving budgets.¹³⁰ Of late a new concept called ‘city deal’ has been coined to ensure local level autonomy and economic growth.¹³¹ A city deal is a partnership between the different levels of governments, the community and the private sector that shifts decision making away from the higher level to local governments. The different actors develop a shared vision and design an inclusive local government that enjoys autonomy and *unlocks local level potential* to accelerate economic growth, city development and job creation.

The concept of city deal along with its inclusive decision making (multiple actors) and the shared vision on local governments among different actors can be a useful framework to reconsider the design of autonomous local governments in Ethiopia. This can help shift the locus of power from higher level to the local as envisaged in the different laws and policies.¹³²

¹²⁸ John Stuart Mill quoted in Roberta Ryan and Ronald Woods, *Decentralization and Subsidiarity: Concepts and Frameworks for Emerging Economies*, Occasional paper Series Number 15, Forum of Federations (2015): 9.

¹²⁹ L. Pratchett, ‘Local Autonomy, Local Democracy and the New Localism,’ *Political Studies* 52 (2) (2004): 359.

¹³⁰ Elliot Bulmer, *Local Democracy*, Primer 13, International Institute for Democratic and Electoral Assistance (2017): 4.

¹³¹ Peter O’Brien and Andy Pike, ‘City Deals, Decentralization and the Governance of Local Infrastructure Funding and Financing in the UK,’ *National Institute Economic Review* 233 (2015): 14–26.

¹³² For comparative insights see Peter O’Brien and Andy Pike, ‘City Deals, Decentralization and the Governance of Local Infrastructure Funding and Financing

The idea of local government deal does not limit the role of higher level institutions but empowers stakeholders at the local level (citizens, business community, elders, youth and women representatives) to be part and parcel of the decision making process at the local level, on regular basis and is not limited to election season. The fact that business community is recognized as stakeholder assists local governments to generate local finance and improve the quality of services. Other sections of society impact decision making and thus enhance participation and accountability.

2.4.1.5 *The Substance of Decentralization*

Powers of Local Governments

The autonomy of local governments depends on the substance of power transferred to them either through a constitution or enabling laws (law on decentralization). These powers may be local government ‘own’ powers or delegated ones from either the federal or state governments. It is the allocation of these powers and the competence of local governments to exercise such powers that contributes to the role and significance of local governments in achieving their goals.¹³³ In this regard one observes three possible types of transfer of power from the centre to the sub units.¹³⁴

Political Decentralization (Devolution)

A local government with political autonomy transferred to it either by constitution or enabling law enjoys possibly the highest autonomy among the possible types of decentralization. The most extensive form of transfer of power often encompasses political, administrative and fiscal transfer of power to a sub unit and empowers the subunit to elect its leaders as well as ensure some element of policy autonomy that enables the sub unit to design its own policies and development priorities in a manner that fits its local context. This type of local government resembles a genuine self-governing unit where real competences are transferred to it.

In terms of monitoring and supervision by higher level, self-governing local governments have least interference. It is also possible that the

in the UK,’ *National Institute Economic Review* 233 (2015): 14–26; Introducing UK City Deals: A Smarter Approach to Supercharging Economic Growth and Productivity. <https://assets.kpmg/content/dam/kpmg/pdf/2014/10/uk-city-deal-economic-growth-productivity.pdf>.

¹³³ Steytler (n 126): 6.

¹³⁴ Bockenforde (n 121): 18–22.

sub unit may have the autonomy to elect its leaders but enjoy only the mandate to implement laws and policies of the higher level and thus does not enjoy policy autonomy. In both cases however the local government has elected law making, executive and possibly judicial organ. As a manifestation of its political autonomy, local government has also the mandate to generate revenues to be able to cover at least some of its expenditures at the local level.¹³⁵ Political decentralization often leads to ‘active citizen involvement and voice in the formulation and implementation of public policies,’¹³⁶ at the local level. It is also argued that political decentralization leads to a more responsive and accountable government at the local level. The actual state of these claims of local governments will be investigated in the relevant sections of the case study.

Deconcentration

The second type of transfer of power may take the form of deconcentration. Deconcentration refers to a form of transfer of responsibility from the centre to sub units that for all intents and purposes are *branches* of the centre which owing to geographic or population size must be open in different geographic centres. It is very much related to the administrative side of decentralization without including transfer of political power to a sub unit.¹³⁷ There is no actual transfer of power as the centre retains its mandate over the matter. Nor do the ‘sub units’ have elected bodies or mandate over substance of policies.¹³⁸

Delegation

The third type is delegation in which the sub units act in the name and on behalf of the centre and local sub units act as agents of the central government. The agent may have some element of administrative and implementing authority but the central government (principal) retains the political autonomy and the mandate to decide on policy issues. In much same was as deconcentration, the sub unit does not have elected bodies

¹³⁵ Bulmer (n 130): 3.

¹³⁶ S. Chattopadhyay, ‘Decentralized Provision of Public Service in Developing Countries: A Review of Theoretical Discourse and Empirical Evidence,’ *Social Change* 43:3 (2013): 426.

¹³⁷ Peter Wanyande, ‘Decentralization and Local Governance: A Conceptual and Theoretical Discourse,’ *Regional Development Dialogue* 25:1 (2004): 5.

¹³⁸ Bockenforde (n 121): 18–22.

nor the mandate to decide on the substance of the policy. In both deconcentration and delegation as legislative power is not transferred to the sub unit, the mandate of the local government is limited to implementing laws and policies set by the higher level.¹³⁹

Arguments Against Decentralization

We have seen already a rich literature that supports the need for decentralization. Yet decentralization is not risk free and there is enough evidence that shows that unless there is capacity, proper supervision, system of local accountability and more importantly *political will* to implement, the goals of decentralization can be frustrated. When Ethiopia introduced federalism and devolution (at local level) in the early 1990s, there was little capacity and resource to implement federalism and decentralization. The federal and regional state governments had to do massive capacity building activities with the support of donors. Ethiopia even went to establish a specialized university (Ethiopian Civil Service University) whose main goal was to build the capacity of regional states in addition to the massive expansion of new regional state based universities. In many newly introduced decentralized systems such as South Sudan, it is possible to see such ambitious and well-intended political goals getting frustrated because of capacity gaps. Devolution in South Sudan lacks the much needed capacity to deliver at the local level. As shown in Chapter 4, lack of capacity at the local level in South Africa has made devolution falter in its promises. Municipal services at local level in Ethiopia are also at risk partly because of capacity gaps.

Entrenched power and interest is also a major challenge to decentralization. Elites and political parties that prefer centralized model of governance use different techniques to obstruct well designed decentralization projects. The dilemma in regional states and zones to focus more on control than autonomy, despite promise for political decentralization, is partly related to entrenched elite interest at that level. The Kenyan ruling elite resisted an otherwise popular demand for devolution for nearly three decades. Even after the adoption of devolution in the 2010 constitution, devolution to the newly established 47 counties

¹³⁹ Wanyande (n 137): 2004, 5.

continues to be a challenge as central government continues to show centralizing trends.¹⁴⁰

Decentralization without proper supervision and system of accountability can end up in elite capture in which multiple centres of power turn into multiple centres of corruption.¹⁴¹ Decentralization may end of creating new corrupt elites at local level who use whatever limited resources for private gain. Local elections and systems of checks and balances between legislature and executive has the potential to limit this danger. The devolution in Kenya as elaborated in Chapter 4 creates 47 elected county governors that are accountable to elected council at the local level. As some opposition political parties different from the one that has control over national government win elections at county level, political pluralism has encouraged the promotion of County autonomy and for a system of local accountability, an important factor for the success of decentralization.¹⁴² Finally unless decentralization is backed by rule of law and proper supervision, local political elite turns itself into local despot and may abuse right of minorities.¹⁴³ Local level decentralization could end up producing local tyrants.¹⁴⁴ This is a risk that happens when there are local governments inhabited by diverse communities but local elite determines to promote only factional interests. Inclusive sub national constitutional design and cast-iron enforcement of bill of rights through robust judicial system can possibly ameliorate such risk.

Some also argue decentralization results in duplication of personnel and resources as there will be two or even more spheres of governments. But this often neglects the reasons for decentralization which is bringing

¹⁴⁰ Conrad Bosire, *Devolution for Development, Conflict Resolution and Limiting Central Power: An Analysis of the Constitution of Kenya 2010* (Unpublished LL.D thesis, University of the Western Cape, 2013).

¹⁴¹ Martin Ardanaz, Marcelo Leiras, and Mariano Tommasi, 'The Politics of Federalism in Argentina and Its Implications for Governance and Accountability,' *World Development* 53 (2014): 26–45.

¹⁴² James Gathii, Harrison Otieno, 'Assessing Kenya's Cooperative Model of Devolution: A Situation-Specific Analysis,' *Federal Law Review* 46:4 (2018): 605–606.

¹⁴³ Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton: Princeton University Press, 1996).

¹⁴⁴ Assefa Fiseha, 'Intra Unit Minorities in a Context of Ethno National Federation in Ethiopia,' *Utrecht Law Review* 13:1 (2017).

government close to the people, creating more opportunities at the local level (including new jobs and employment) to marginalized groups: a key rationale for accommodation.

2.4.2 *Written and Supreme Federal Constitution*

2.4.2.1 *Federalism as a Covenant?*

A second essential feature of federations relates to the fact that the division of power between the federal government and the states is based on a written and supreme federal constitution to which both orders of governments must submit. Federations originate from particular bargains struck at a particular time designed to serve for generations. Written constitutions are, therefore, necessary records of the terms of the bargain. Indeed, to write and adopt a constitution is to agree to the bargain itself.¹⁴⁵ The terms of the agreement, which establish the federal government and the states and which distribute powers between them, must be enshrined in a supreme federal constitution, which is binding. This is a logical necessity deriving from the nature of the federation itself. If the federal government and the states are to remain autonomous within their respective spheres of jurisdiction, the authority of one should not depend on the other but must derive from something supreme to both of them. The federal constitution regulates their relations and so far as it regulates their relations with each other, it must remain supreme at least in all that concerns the division of authority between the two.¹⁴⁶ In short, the federal arrangement presupposes the existence of a supreme federal constitution from which the federal government and the states derive their authority. Federal and devolved systems are essentially rule of law based. In case of violation by either level of government over the scope of authority as defined by the constitution that binds both levels of governments, an umpire must adjudicate the dispute and enforce the constitution against the violator. This principle is thus the foundation for the rule of law in a federation.

Many federal constitutions express the essential supremacy of the constitution. The United States Constitution declares ‘this constitution, and the laws of the US which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the US

¹⁴⁵ Riker (n 7) at 17.

¹⁴⁶ Wheare (n 17): 55–57.

shall be the supreme law of the land.’¹⁴⁷ The German Basic Law stipulates albeit more generally, the same principle. ‘Legislation is subject to the constitutional order; the executive and judiciary are bound by law and justice.’¹⁴⁸ Equally, the Ethiopian Constitution too declares, ‘The Constitution is the supreme law of the land...’¹⁴⁹

From this emanates the argument that federations are based on a ‘compact,’ covenant or to use the Latin word *foedus*. Federations are considered to have resulted from the federal idea of compact, implying an agreement that is freely and mutually consented to. For instance, Elazar maintains that ‘federations evolve from a compact which is a deliberate coming together of humans as equals to establish bodies politic in such a way that all reaffirm their fundamental equality and retain their basic rights. Politics whose origins are covenants reflect the exercise of constitutional choice. Each polity remains as a matrix compounded of equal partners who come together freely and retain their respective autonomy even as they are bound in a common whole.’¹⁵⁰ The autonomy of the states and the unity through the shared powers emanates from the covenant. One also noted: ‘The nature of consent to a covenant is critical for the legitimacy and perpetuation of the federal arrangement. Where there is no will to federate, federal arrangement may not be possible.’¹⁵¹ Alain Gagnon also stated that one must ascertain if the initial impulse to adopt a federal system comes from internal or external forces or both. This point is important because it verifies whether a federal system in a given country has been imposed or desired. A ‘federal will’ seems to be an absolute prerequisite, for anything contrary is tantamount to planting a time bomb under the heart of the system.¹⁵²

¹⁴⁷ US Constitution Article VI Section 2.2.

¹⁴⁸ German Basic Law Art. 20 sub 3.

¹⁴⁹ Ethiopian Constitution Art. 9 sub 1.

¹⁵⁰ Elazar (n 23): 2–7.

¹⁵¹ John Kincaid (n 37) at 32.

¹⁵² Alain Gagnon, ‘Federalism in Multi-Community Countries: A Theoretical and Comparative Framework of Analysis,’ in Lloyd Brown-John ed., *Centralizing and Decentralizing Trends in Federal States* (Lanham: University Press of America, 1988) at 25. In support of this assertion Nancy Bermeo claims, ‘in each of the post-communist cases, failed federalism was the legacy of imposed rule and of a past shaped by a dictatorial party. The countries that broke away from the Soviet Union had their federal status imposed on them at the end of WWII by the Soviets.’ She proposes that an imposed federal system

2.4.2.2 *Foedus: Meaning and Implication*

Federalism has its origins in the covenant (Biblical) or in its narrow and secular sense compact theory.¹⁵³ It implies the coming together of the parts and the establishment of partnership among co-equals. There are parties involved, the purpose of the pact is defined through negotiated process, the principles are outlined, sanctions are agreed upon in case of violation and the parties make oath to make it binding among them. Federalism is a negotiated political arrangement between the federal government, the states and the citizen and one must note the negotiation is an *on-going and integral part* of the constitutional arrangement. It does not stop once the compact is established but it is an on-going adaptation of the compact through mutual consent among the co-equals. The partnership and equality is stated in the federal compact (constitution) and manifested in the system of intergovernmental interaction/relations in the day today operation of the federation. The interaction between the levels of governments is based on co-ordination and not subordination. Federalism as compact contrasts with those arrangements founded on *hierarchy* such as in decentralized unitary systems where there is commanding center and conquest (empires established on force). *Foedus* and working intergovernmental arrangement imply outright rejection of violence as a means to meet political and economic goals. There cannot be federalism in violence and in hierarchy or command post.

The idea of federalism as compact also implies that the compact *binds* the parties to the negotiated deal: the federal government, the states and the citizen. It ensures the parties autonomy. In this sense federalism requires adherence to particular *ethos*. The respect and commitment to the federal pact as enshrined in the negotiated constitutional arrangement, faithful compliance and enforcement of the pact and equally important protection against unilateral encroachment. In this sense the compact is

would be unlikely to last. The roots of the word federal lie in the Latin term *foedus* meaning covenant or compact. Covenants have to be voluntary and based on a sense of partnership. Every federal system that split apart or turned towards unitary form was imposed by an outside (usually) colonial power. Bermeo (n 9): 106–108. They are often called ‘forced together’ federations which indicates strong evidence of the fact that federal arrangements must be based on a domestic covenant if they are to survive.

¹⁵³ Daniel Elazar, *Covenant and Polity in Biblical Israel: Biblical Foundations and Jewish Expressions. The Covenant Tradition in Politics*, v. I (New Brunswick, NJ: Transaction Publishers, 1995): 35–51, 194–195. Elazar has contributed enormously to the idea of covenant in many of his publications.

constitutional and institutional deal but beyond that it is also a *norm* for non-centralized governance. It limits the boundaries for the exercise of power and hence is interlinked with the notions of constitutionalism.

As argued in Chapter 1 about the nature of state power in Africa and in Chapter 4 about federal and devolved systems in Africa, federalism as compact and the idea of big man, hegemonic one party and over centralization (imperial center) are strange anomalies and it is not difficult to trace the problems associated with federal and devolved systems in Africa. The ethos of autonomy of component parts, the essence of partnership between the levels of government, the idea of negotiated political settlement (as opposed to use of violence and coercion) and the lack of sanctions to unilateral violation of the pact are the main concerns many African federal and devolved systems continue to face. Federalism as compact has no one center, it is a matrix of multiple centers of power while in Africa there is often one imperial center (Chapter 4).

2.4.2.3 *Limits to the Notion of Federalism as a Covenant*

In a way it may be correct to state that federations are based on contractual relations. The component states of a federation and the federal government may have entered the union by their own free decision. The federation resulting there from may provide mechanisms for the states and federal government to negotiate continuously with the federal center over various matters.

But the assertion that federations are based on compact needs to be adopted with some qualification. First, federations unlike confederations are not exclusively based on the presumed existence of sovereign states. Equally important is the individual citizen who is subject to two orders of government. Federal governments and the institutions that result there from are organized partly on the principle of majority based on population size and partly on representation of territories, which may grant the territories equal or unequal representation. Stating that federations are based purely on covenants gives too much emphasis to the role of the states during the federal bargain and ignores the role of the citizen as a source of legitimate authority. King has rightly pointed out that at the heart of the social contract in federations is the fact that both the individual and territory represent certain interests requiring recognition and

protection from the constitution.¹⁵⁴ Federalism assumes that the basic interest bearing units within the federations are territorial, the interests of these units being usually represented in the second chambers. It also assumes that individuals are also the ultimate right and interest bearing units within the federation in so far as the direct operation of the federal center is concerned.¹⁵⁵ It is the duty of the federation to protect the individuals and the groups who bear specific rights and interests in the states.

Secondly, even referring to the states, which constitute the federation, they do not in all cases freely agree to enter or remain in the union.¹⁵⁶ The 1848 Swiss federation was established following the military defeat of the catholic cantons (*Sonderbund*) that attempted to secede from the confederation in 1847. In the case of India, indeed, the union is not considered at all as something resulting from sovereign states. It was not altogether willingly that the 565 princely states of India were brought to the Union in 1948.¹⁵⁷ In the United States, the delegates of the 1787 Philadelphia convention met in the context of the Articles of confederation which could be amended only by all thirteen states (Article XIII), and whose opening paragraph named all the states in order from north to south. Yet the new text that emerged stated that it was to become a constitution for those who ratified it when nine states did so. Besides, even if we agree that the compact maintains the continuity of the right of states to participate, then the union was under serious threat during the Civil War (1861–1865) and survived when the southern states were defeated by the northern states.¹⁵⁸

The 1949 West-German federation resulted from the imposition of the Allied forces following the defeat of the Second World War. WWII ended with the unconditional surrender of Germany. The USA, UK, Soviet Union and France took over all powers and responsibilities in the country. They agreed to divide German territory into four occupational zones and to dissolve Prussia. The Cold War deepened the gap between the Soviet and the three western zones and made an agreement among all

¹⁵⁴ King (n 57) at 58.

¹⁵⁵ Ibid., at 59.

¹⁵⁶ Ibid.: 88–89.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

four powers on the future of Germany impossible.¹⁵⁹ Hence, Germany was divided into two by the winners of the war. The part that was to become West Germany had its component territories structured. Eight of the eleven states were artificially devised by the Allies.¹⁶⁰ The ‘Basic Law’ was not approved by a popular vote and the parliamentary council that endorsed the constitution was certainly not elected. The Basic Law was only conceived as provisional text largely because it divided Germany into two and partly because its basic features were imposed.¹⁶¹ For the same reason it was called not a constitution but Basic Law, indicating its temporary nature. The Allied forces who fought twice in a short span of time wanted to create a weaker center than the one they had fought with. The chief device in achieving this objective was centrifugal federation. Because of this context King concludes, ‘we are entitled to regard the constitution as an imposed arrangement.’¹⁶² As we indicated earlier the *Länder* were dominantly artificial creations of the Allies and the parliamentary council, the body that formulated the new constitution was not a directly elected constituent assembly but rather was composed of representatives of *Länder* parliaments (assembly of 65 representatives of the *Land* parliaments which were at that time the only effective organs in West Germany) in the three western zones.¹⁶³ Accordingly, the argument that federations result from freely concluded covenants remains far from a universal principle.

Thirdly, even if it results from contracts, it still has a *unilateral* character. If we focus on the center-seeking federations (as in Switzerland and the US), the central government, crucial for the federation is absent during the federal bargain.¹⁶⁴ The limitation of the contractual basis of federations is even stronger in centrifugal federations. In Nigeria for instance it is argued that dualistic federalism of the theoretical postulate did not exist in the first place. The Nigerian federation was neither a contract between the states nor was it a voluntary union of a number

¹⁵⁹ Rudolf Hrbek, ‘Germany,’ in Ann Griffiths ed., *Handbook of Federal Countries 2002* (Montreal and Kingston: McGill-Queen’s University, 2002): 149.

¹⁶⁰ King (n 57) at 97.

¹⁶¹ *Ibid.*, at 98.

¹⁶² *Ibid.*

¹⁶³ Hrbek (n 139) at 149.

¹⁶⁴ King (n 57) at 101.

of originally independent states. Historically, the federated states did not have a separate existence as political systems prior to the federation.¹⁶⁵ The same could be said of Ethiopia. Although the 1995 federation was adopted by an elected Constitutional Assembly, it is clear that the states as they exist today were never the major actors in the federal bargain. They are indeed the creations of the Constitution. In centrifugal federations, it could be said that the states are absent during the federal bargain. As a result, a federation resulting from such a negotiation in which one of the parties is absent turns out to be less contractual.

The principle that federations are based on a 'compact' should therefore be taken in a qualified sense. It is certainly true that some level of participation should exist when the federation is about to be set up. But beyond that it is difficult to prescribe any level of participation. Perhaps it is only safe to state that in order to guarantee continuously the autonomy of both governments and to prevent any possible encroachment of power by one level over another, the 'agreement' must be enshrined in a constitution that is both supreme and written. The relationship between the federal government and the states must be established in such a document, which only in that sense may be considered as compact. Yet, it is vital to note that the compact is often open for negotiation across time and the federal will must exist among both levels of governments. Otherwise, the relevance of the federation will wither away and may turn into something else: confederation or unitary state depending on whether unity or diversity is prevailing.

2.4.3 *Rigid Constitution*

The third important feature of federations emanates from the principle requiring the supremacy of the constitution. Federal constitutions must be rigid and require the participation of both the federal government and the states for their amendment. If the federal constitution contains the basic principles governing the relationship between the federal government and the states and if the authority of both governments derives from the constitution, then it follows that in order to ensure its supremacy, it should not be subject to unilateral alteration by either order of government alone. Indeed, the idea of federations as compact demands that if

¹⁶⁵ Egite Oyovbaire, *Federalism in Nigeria: A Study in the Development of the Nigerian State* (London: Macmillan Publishers, 1985): 17.

introducing formal changes to the federal constitution is deemed necessary then both the federal government and the states [through their government or their people] must participate in the amendment process. According to Carl Friedrich, the participation of the states in the amendment of the constitution is a key feature of a federation.¹⁶⁶ Furthermore, if the supremacy of the constitution is to be maintained it should not be easily alterable. That the amendment procedure should be rigid is also a requirement.¹⁶⁷ Constitutions change and adapt and an agreed method for achieving constitutional adjustments as the need arises is often the key to the continued success of the federation. Federations are ‘regular seminars on governance’ requiring adjustments in response to changing circumstances.

Apart from this general principle, however, federal constitutions differ significantly both as regards the specific procedures they prescribe and the degree of states participation for any amendment. On the one hand we have federations that require the consent of every state for any amendment and on the other we have federations where the ordinary vote of the federal parliament may sometimes suffice for amending the constitution. The Indian constitution falls into the latter category. However, those provisions vital for the distribution of power between the federal government and the states can be amended only by special majority of parliament and ratification by at least fifty per cent of the states.¹⁶⁸ In many other constitutions they are amended according to procedures that differ from the procedures for amending ordinary laws. In the US according to Article V amendments can be proposed by a two-thirds majority of each house in Congress or the legislative institutions of two-thirds of the states may request Congress to call a constitutional convention to consider and propose amendments. Ratification can also take one of two ways. It may require approval by three-quarters of the legislative institutions of the states or by three-quarters of the convention. In short, all amendments even if they do not affect the federal distribution of power, require ratification by three-fourths of the states or the convention. The only

¹⁶⁶ Friedrich (n 21): 6–7.

¹⁶⁷ D.J. Kriek, ‘The Rigidity of the Constitution,’ in D.J. Kriek ed., *Federalism the Solution?* (Pretoria: HSRC Publishers, 1992): 57–58. The term rigidity means here that the procedures for amending the constitution differ from the procedures for amending an ordinary law. Often the former require a more rigorous procedure.

¹⁶⁸ Indian Constitution Article 368.

exception to this is that no amendment may be made to alter the equal representation of the states in the Senate.¹⁶⁹

In Switzerland, a proposal to amend the constitution may be initiated by the federal legislature or in some circumstances by one house of the federal legislature or even by 50,000 citizens. Whichever way an amendment may be initiated none can be effective until it is approved by a referendum: both a majority of the electorate and a majority of the cantons¹⁷⁰ must give their consent to complete or partial amendment before either is finalized.¹⁷¹ In other words the voters themselves have the right to propose and also to ratify amendments.

In Germany, Article 79 prescribes that the Basic Law can be amended only by laws that expressly alter or supplement its text. Any such law requires the consent of a two-thirds majority of votes in both the *Bundestag* and the *Bundesrat* of the German parliament.¹⁷² The following, however, cannot be amended: laws affecting the division of the federation into Länder, laws affecting the principle of the participation of Länder in legislation and laws affecting human rights as stipulated in Articles 1–20 of the Basic Law.¹⁷³

The Ethiopian Constitution is perhaps more rigid compared to the other federations. In principle, the Constitution does not incorporate unamendable provisions. It requires the participation of both the federal and state governments in all amendment cases. Some of the provisions, mainly those prescribing the procedure for amendment itself, and those governing fundamental rights and freedoms can only be amended if approved by the majority vote in all the states and by a two-thirds majority vote in each of the federal houses.¹⁷⁴ While the majority of the provisions, including those governing the relationship between the federal and state governments, can be amended only if approved by a two-thirds majority

¹⁶⁹ US Constitution Article V.

¹⁷⁰ Swiss Constitution Article 142 sub 3 states the result of popular vote in a canton determines the vote of the canton.

¹⁷¹ See Articles 138–142 of the Swiss Constitution; see also Krick (n 167) at 64.

¹⁷² German Basic Law Article 79 sub 2.

¹⁷³ Ibid. Article 79 sub 3; see also Krick (n 167) at 66.

¹⁷⁴ Ethiopian Constitution Article 105 (1) a and 105 (1) b, and c.

vote in a joint session of both federal houses and a two-thirds majority vote of states.¹⁷⁵

The 2010 Kenyan constitution Articles 255–257 provide comprehensive regime regulating the process of amendment. In a nut shell, three procedures are articulated. Amendments related to the supremacy of the constitution, the territory of Kenya, the sovereignty of the people, national values enshrined in Article 10 of the constitution, the bill of rights, term limits to the President and those that concern the judiciary, parliament and devolution go through a very rigid process. A referendum in which 20% of registered voters in each of at least half of the counties and simple majority of registered voters must approve it. For other matters, the two national houses must endorse by a two-third of their members and assented by the President. Amendment can also commence through popular initiative if one million registered voters sign and each county with the Electoral body supervising the process approves it, that will then have to go to the two national houses as in the second procedure.

Section 9(2) of the Nigerian Constitution provides two procedures for amending the constitution. If the request for amendment involves the establishment of new state or adjustment to a boundary of a state, the bill of rights or the amendment clause, then four-fifth majority of each house of the national assembly and two-third majority of the states (24 out of 36) must approve it and then sent to the President for signature. For other clauses of the constitution, a two-third majority in each national assembly and two-third of the states (24 out of 36) must approve it and submit to the President for signature.

Compared to the three above mentioned African federations, the South African Constitution section 74(2) provides less rigid constitutional amendment procedure requiring two-third majority in the National Assembly (267 out of 400) and approval in the National Council of Provinces by six out of nine provinces. While in Ethiopia, Nigeria and Kenya the sub-units are engaged in the process of constitutional amendment particularly those matters that affect their mandate and the federation, in South Africa, it is only the National Council of Provinces, not each Province directly that decides on amendment. The role of the Provinces is very much limited.

¹⁷⁵ Ethiopian Constitution Article 105(2) a and 105(2) b.

2.4.4 *Umpiring the Federation*

Equally important in a federation is the presence of a body that umpires disputes concerning the constitutionality of laws in general and the division of powers in particular. From the principle of constitutionally guaranteed division of power and the supremacy of the constitution follows that the last word in settling disputes about the meaning of the division of powers must not rest either with the federal government alone or with the states.¹⁷⁶

It has already been noted that the constitutionally entrenched division of power is the hallmark of federations. However, the division of powers between the federal government and the states cannot be delineated in such a way as to avoid all conflicts. As R. Davis notes the ‘division of power is artificial, imperfect and a generalized skeletal thing. Political life cannot be perfectly or permanently compartmentalized. The words can rarely be more than approximate crude and temporary guides to the ongoing or permissible political activity in any federal system.’¹⁷⁷ Certainly disputes about the terms of the division of power are bound to occur. Besides, adaptation and the need to adjust and accommodate the division to cope with the new, the unforeseen and the unintended remains crucial and interpretation is one of such methods. In the United States this is achieved through the Supreme Court. In Switzerland the last word does not seem to rest with the federal tribunal. It may decide cantonal laws to be invalid but it must accept the laws of the federal legislature as valid. The constitutionality of federal laws is reviewed through a referendum. A law passed by the federal legislature must be submitted to the people for approval when contested for its constitutionality. Only the people have the last word as to whether such a law shall become effective.¹⁷⁸

In Germany, the Constitutional Court takes care of the duty of enforcing the supremacy of the Basic Law. Unlike the US Supreme Court, the Court does not involve itself with the ordinary settlement of disputes. It only handles issues that involve interpretation of the Basic Law.¹⁷⁹ In

¹⁷⁶ Wheare (n 17): 60–61.

¹⁷⁷ Davis (n 36) at 143.

¹⁷⁸ Wheare (n 17) 9: 18–19.

¹⁷⁹ Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd edn (Durham: Duke University Press, 1993) at 3.

Ethiopia, the HoF is responsible for adjudicating constitutional cases in general and federal issues in particular.¹⁸⁰

In sum, an impartial body, independent of the federation and the states, that decides on the meaning of the contested provisions concerning the division of power is essential for a federation.

2.5 FEDERALISM AND SECESSION

Whether federal constitutions should regulate secession or not remains controversial.¹⁸¹ International law does not permit or deny secession and remains ambiguous on secession leaving the matter to manipulation unless the parent state consents to it as in the case of Eritrea (by Ethiopia in 1993) and South Sudan (by Sudan in 2011). Somaliland has remained *de facto* independent since 1991 for more than three decades exercising effective control over its territory and conducting regular elections but has not gained international recognition. Yet, it is vital to note that a lot has changed since the end of the Cold War. While only Bangladesh seceded in the 1970s, some twenty seven new states emerged in the early 1990s. Secession in a non-colonial context is thus on the rise unlike the pre-Cold War era.¹⁸²

Allen Buchanan has developed what many call it just-cause or remedial right theory of secession to fill the gap in international law. He argued a group has a right to secede only if either (a) it is systematically oppressed or exploited, or (b) had its territory been unjustly annexed or (c) ethno national groups autonomy has systematically been violated.¹⁸³ Others have added ‘choice theory’ that despite absence of violation of any of the above conditions recognize the right to secede by a particular region or group so long as there is an express wish to that effect.¹⁸⁴ Democratic

¹⁸⁰ See chapter eight for details.

¹⁸¹ See for details Martin Riegl and Bohumil Dobos eds., *Unrecognized States in the 21st Century* (Cham: Springer, 2017).

¹⁸² Glen Anderson, ‘Unilateral Non-Colonial Secession and Internal Self-Determination: A Right of Newly Seceded Peoples to Democracy?’ *Arizona Journal of International and Comparative Law* 34:2 (2016): 2.

¹⁸³ Allen Buchanan, *Justice, Legitimacy, and Self-Determination* (Oxford: Oxford University Press, 2004).

¹⁸⁴ D. Gauthier, ‘Breaking Up: An Essay on Secession,’ *Canadian Journal of Philosophy* 24 (1994): 357–372.

theory that focuses on the wishes of the people reinforces this position. Within comparative federalism the *compact theory* provides similar right. This can be gathered from the nineteenth century United States and Swiss Confederations, the former resulting from the vague position adopted by way of compromise between the authors of the Virginia and the New Jersey plan at Philadelphia in 1787.¹⁸⁵ The gist of the argument is that, contracting parties remain free to join or withdraw from such an association, if the other party violates the terms of the compact.¹⁸⁶ This is further reinforced by the fact that federations are established, at least as far as the older ones are concerned, from previously sovereign states. The fact that they entered into the compact, it is argued, does not imply that they have surrendered their sovereignty. Accordingly, 'no state member of the federation can ever be obliged to act in a manner inconsistent with its own reading of the constitution which defines its relations with other members.'¹⁸⁷

¹⁸⁵ In Switzerland this happened in 1847 when some cantons attempted to secede from the confederation. See Thomas Fleiner and Lidija Basta, 'Federalism, Federal States and Decentralization,' in Lidija Basta and Thomas Fleiner eds., *Federalism and Multiethnic States: The Case of Switzerland*, v. 16 (Fribourg: Institute of Federalism, 1996) at 36. They stated 'Great personalities like Alexander Hamilton insisted on giving the central government sufficiently large powers while the others like Thomas Jefferson were critical about such a move. The two not only represented different views but were also leaders of two prominent parties, the former of the Federalist and the second of the Republican. A crucial factor in the intensification of the tension between the north and the south was the slave system. The northern states were pro industrialization, while the South were mainly agricultural. Industry needed skilled and free labor, while agriculture in the south depended on slave labor. The latter states owned large number of slaves to work on their farms while the industries of the north could be run with the help of free and skilled labor. As a result the north went for abolition of slavery to free the slaves so that they could work wherever they liked and this created a great rift between the north and the south on economic and social questions and finally led to the Civil War (1861–1865). Outraged by these moves from the center and the north, on December 20, 1860 the South Carolina legislature called a convention and passed a unanimously approved decision repealing the Constitution of the United States and approving secession. Within a short period of time a similar decision was made in Mississippi, Florida, Louisiana, Georgia and Texas. On February 14, 1861, the delegates of the seceding states met at Montgomery, Alabama and drew up a constitution for the Southern Confederacy. This led to the Civil War from 1861 to 1865, resulting in a complete victory for the federalist forces.' King (n 57) at 109.

¹⁸⁶ See Margaret Moore, ed., *National Self-Determination and Secession* (New York: Oxford University Press, 1998).

¹⁸⁷ King (n 57) at 109.

Comparative studies on federalism show there are three trends that explain the relationship between federalism and secession. Most federations are silent about secession and do not explicitly regulate it as in Germany, Australia and Switzerland. Some federations expressly prohibit secession. In the United States, the Supreme Court following the end of the Civil War (1865) declared the United States as ‘indestructible union.’ India based on the lessons from the secession of Pakistan designed a very centralized federal system and it is popularly described as indestructible union of destructible states. The fact that the federal parliament can make and un make the boundary of the states makes the states vulnerable to central government’s manipulation.

The third approach is pragmatism. Some federations such as Canada although silent on the issue of secession have chosen a pragmatic pathway. Quebec held a referendum twice in 1980 with 59% saying ‘no’ while 40% ‘yes’ for secession. The defeat of the ‘yes’ group led to more centralization that triggered a more aggressive reaction from Quebec leading to Quebec’s quest for a second referendum in 1995.¹⁸⁸ Promises made before the first referendum to renew the federal pact and address Quebec’s autonomy were betrayed by the federal government. In particular Quebec’s call for asymmetric autonomy and recognition as distinct nation was not welcomed by the federal government. In relation to the second referendum in 1995, the federal government requested the Supreme Court of Canada whether Quebec had the right to secede under the Constitution or international law and the Court ruled in 1998 (*Reference re Secession of Quebec*) that if Quebec citizens were to support secession on the basis of a *clear question* and with a *clear majority* vote, there is a constitutional obligation to negotiate a new pact and thus both the federal government and the state must negotiate leaving the matter for the political process to sort it out.¹⁸⁹ The Court identified federalism, democracy, constitutionalism and minority rights to be the guiding principles. Although the secessionists lost the vote, Quebec has gained

¹⁸⁸ Francois Rocher and Elisenda Casanas Adam, ‘Responding to Secession Referenda: Constitutional and Quasi Constitutional Change in Quebec and Scotland,’ in Andre Lecours, Nikola Brassard-Dion and Guy Laforest eds., *Constitutional Politics in Multi-national Democracies* (Montreal and Kingston: McGill-Queen’s University Press, 2021): 62.

¹⁸⁹ George Anderson, *Federalism: An Introduction* (Oxford: Oxford University Press, 2008): 79.

substantial autonomy compared to other provinces of Canada resulting in asymmetric (Quebec enjoying more autonomy than other provinces) federation in 2006, where the federal government also conceded that constitutional amendment will not be made without the consent of Quebec.¹⁹⁰

Catalan of Spain shows the opposite of Quebec (Canada). During Franco's repressive and assimilationist policy, Catalonia suffered under majoritarian dictatorship. Catalan language was banned and its cultural institutions dissolved. With Franco's death in 1975, Catalan demand for self-government got resurgence. Constitutional reforms in 1978 led to the establishment of autonomous regions throughout the country. This led to some policy autonomy (such as education, language and health) in 1980s and 1990s but the reforms were conducted in symmetric fashion to all regions within the framework of the 1978 constitution and without taking Catalonia's distinct features.¹⁹¹ The 1990s also show transfer of some fiscal revenue sources to regions and an increase in fiscal grants. The central government despite the reforms insisted, there was no recognition of national minorities and Spain was portrayed as nation state, not as multination. The central government was also pursuing homogenization and standardization of policies using framework laws despite calls for policy diversity from Catalonia. Catalan nationalists began to push for recognition of their region as distinct from the rest of the country and for Spain to be pluri national, not a nation in late 1990s and early 2000. The Catalan regional parliament passed a legislation transferring significant powers and fiscal resources to itself, recognized Catalan as distinct nation and reconfigured Spain as multination in 2005. The law was sent to the Spanish parliament for approval. In what some call a 'majority backlash,' the central government reacted against the law and emphasized on the unity and unitarist conception of the Spanish nation. More importantly the Constitutional Court of Spain annulled the most vital parts of the law denying Catalan as distinct nation in 2010. This in turn resulted

¹⁹⁰ Alain-G. Gagnon and Richard Simeon, 'Canada,' in Luis Moreno and Cesar Colino eds., *A Global Dialogue on Federalism: Diversity and Unity in Federal Countries* (Montreal and Kingston: McGill-Queen's University Press, 2010): 119.

¹⁹¹ Karlo Basta, *The Symbolic State: Minority Recognition, Majority Backlash and Secession in Multination Countries* (Montreal and Kingston: McGill-Queen's University Press, 2021): 107.

in radical national movements in Catalonia under the slogan, ‘we are the nation, we decide’ leading to the unilateral secession referendum in 2017.

In response, the central government suspended Catalan’s autonomy, sent its forces to stop the referendum and began to hunt the Catalan leaders.¹⁹² Thus one sees a more accommodative Canada towards Quebec and a more repressive and centrist oriented Spain towards its national minorities. In particular the differences between the highest Courts in both Countries is notable: the Supreme Court of Canada adopting a more pragmatic approach recognizing secession if supported by a majority in Quebec and subjecting the process to constitutionalism, rule of law and minority rights while the Spanish Constitutional Court largely falling into hands of the majority and complete disregard towards national minority rights.

The Comprehensive Peace Agreement (CPA) between Sudan and South Sudan (2005–2011) also regulated secession. While requiring both signatories to make unity attractive, the CPA provided the possibility for South Sudan to secede following a referendum and an overwhelming majority voted for independence in 2011, resulting in a new state of South Sudan.

Following the collapse of Yugoslavia, Montenegro seceded from the parent state having fulfilled a 55% vote in favour which was agreed upon a head. The United Kingdom though a unitary devolved system had to allow a referendum in response to request for secession from Scotland in 2014 resulting in 55.3% ‘no’ and 44.7% in favour of secession with 84.5% voter turnout—one of the highest in recent history. There is the need to frame the referendum question as simple and clear. For example in the case of Scotland both governments agreed on the referendum question to be ‘Should Scotland be an independent country? Yes/No.’¹⁹³ The procedure required a simple majority vote to decide the outcome. We should note, Quebec and Scotland’s quest for secession is in many ways distinct. Both are rich and unlike many cases of secession are not marginalized ones, although they may have been in the past. Both cases

¹⁹² Ibid.: 110.

¹⁹³ Francois Rocher and Elisenda Casanas Adam, ‘Responding to Secession Referenda: Constitutional and Quasi Constitutional Change in Quebec and Scotland,’ in Andre Lecours, Nikola Brassard-Dion and Guy Laforest eds., *Constitutional Politics in Multi-national Democracies* (Montreal and Kingston: McGill-Queen’s University Press, 2021): 51.

also demonstrate that despite substantial support for secession, *working and democratic federations* do not lead to fragmentation. On the contrary, as seen in the former Soviet Union and Yugoslavia and despite express clauses for secession in the constitution of both countries, denial and suppression leads to violence and fragmentation.

2.6 EXTRA CONSTITUTIONAL FACTORS

As can be observed from the features discussed above, the focus is on a set of institutions anchored in a constitution and the division of power between the federal government and the states. K. C. Wheare was the first to emphasize the importance of these institutions and his study is rightly called the legal/institutional approach to federalism. But his study was criticized by many as emphasizing too much on rigid institutions and for being too legalistic. It is true that despite these common features some federations fail while others perform better. As a result, it raises the question as to why this is so. Several factors have been mentioned in this regard.

Livingston argued that federalism goes beyond legal institutions. ‘The essential nature of federalism is to be sought for not in the shadings of legal and constitutional terminology, but in the forces economic, social, political, and cultural that have made the outward forms of federalism necessary ... the essence of federalism lies not in the constitutional or institutional structure but in the society itself. Federal government is a device by which the federal qualities of the society are articulated and protected.’¹⁹⁴ Political institutions change and adapt to be congruent with the nature of the society. Federalism is thus not only legal and institutional but also societal.¹⁹⁵ According to him the federal institutions are reflections of the federal qualities of society. In today’s vocabulary, the nature of the society that the federation aims to manage and the cleavage matters. Cleavages impact institutional design. Deeply divided societies with politically mobilized groups in multinational federations often demand political autonomy. Constituent unit territories may have to

¹⁹⁴ Livingston (n 15) at 84. By federal society he meant a territorially grouped and politically mobilized diversity.

¹⁹⁵ Federalism is also linked with political economy and resources and fiscal and resource management in federations is well developed discipline on its own.

be redrawn to ensure such groups self-government. Whereas if the cleavages are not mobilized or found dispersed as is the case in many territorial federations, the nature of the institutions need not aim at ensuring self-government but reduce majority tyranny or improve service delivery at local level. Livingston's contribution was significant as he pointed out the fact that the study of federalism goes beyond legal institutions such institutions being manifestations of the nature of society. Latest analysis that establishes the link between federalism and society has been developed by Jan Erk.¹⁹⁶ Unitary Belgium had to go through decades of negotiations and become a federation since 1993 in response to language based cleavages resulting in significant transfer of power from the center to sub units. Whereas homogenous German federation has become more centralized than it was in 1949: the society remained the same but the institutions have changed reflecting the reality on the ground. Yes this has also its own limitations. A study explaining causes of state fragmentation based on data from former USSR and Yugoslavia shows that the birth of a new nation state from an existing multinational state is very high in particular if the ethno national minority had already existing sub unit institutions called 'segmental institutions thesis.'¹⁹⁷ The logic is political institutions have significant effect in shaping and framing identities as they provide platform for national mobilization and political ambitions for collective action and secession is as such an upgrade of the existing segmental institutions to a new nation state. The making and unmaking of constituent unit boundaries and the principles and processes for doing so remains contested because it either aims to frustrate the ambition of segmental identity as it breaks a potential nation state pieces (Nigeria, Kenya, South Africa) or empowers the segmental identity (Ethiopia). As will be illustrated in Chapter 4, this reality shapes constitutional politics and has impact on constitutional design and can be managed before causing conflict and fragmentation.

Federal institutions once created in turn shape and influence society. There is a complex relationship, which is not unilateral, between society, its institutions and its constitution. One cannot deny the fact that the years 1789, 1848 and 1995, for instance, mark the turning points in

¹⁹⁶ Jan Erk, *Explaining Federalism: State, Society and Congruence in Austria, Belgium, Canada, Germany and Switzerland* (London: Routledge, 2008).

¹⁹⁷ Philip G. Roeder, *Where Nation-States Come from Institutional Change in the Age of Nationalism* (Princeton: Princeton University Press, 2007): 20–21.

the United States, Switzerland and Ethiopia respectively. The two older federations emerged from an earlier weak center and certainly the new institutions had an impact in transforming society. The post-1991 federal system in Ethiopia, too, has radically changed the political process since then. While the idea of 'Amhara' may have been contested in 1991, today one finds several parties that claim to represent the Amhara. Thus, the specific society under which the federal system operates also impacts institutions and the institutions matter.

Experts argue for a federation to be a successful political structure, it must be honest to its proclaimed nature. That is to say, it should be a federation in form as well as in operational reality. This is one of the core challenges for many federal and devolved systems in Africa. Nigeria's federalism remained under military rule until 1999 and thus was considered by experts as sham. The federal system in Ethiopia remained a victim of hegemonic and dominant party rule that focused more on economic transformation than genuine self-rule. Latest developments also hint centralization is on its way despite leadership changes. Some thus talk about 'federations without federalism in Africa' referring to the mismatch between promise and reality. Others have emphasized the importance of democratic pluralism and the existence of decentralized party system. 'Federalism cannot exist without democratic pluralism which permits groups really to be autonomous. It is sometimes argued that an authoritarian one party system which by definition concentrates all political power in the hands of one group at one central point, is incompatible with the federal concept of divided power. Indeed, this factor seems to explain the differences between the Nigerian and Indian federations. Although both federations remain multicultural, India's centralizing feature is moderated by the political party system, particularly since 1967 in the states and since 1989 at union level. The Nigerian federal system, however, operated for a long time under strong military influence. Still others emphasized the fact that not only should the beginning of the federal process be voluntary but also that the process thereafter should have an inbuilt spirit of sense of partnership between the different actors in a federation.

In most African federations, the will to keep the federation going—federal spirit, the *foedus* is missing. Instead of adapting the federation to new developments through interpretation, negotiation or amendment, the regimes resort to unilateral action or federal withdrawal resulting in conflict, civil war or secession. Resort to bargain and negotiation

than violence and use of force is integral element of federalism. There is no federalism without *foedus*. It refers to the commitment to implement federalism as outlined in the pact by both levels of governments. Resort to force or unilateral action goes against the federal will. The Ethio-Eritrea federation (1952–1962) was unilaterally dissolved by the emperor and the result was civil war and Eritrea's secession in 1993. The Addis Ababa Agreement that ensured autonomy to South Sudan and that brought relative peace to the Sudan was unilaterally abrogated by the regime in Khartoum resulting in devastating civil war and secession of South Sudan in 2011. Withdrawal of federal promises unilaterally has thus consequences. Federal systems establish an impartial institution in the form of Supreme Court or Constitutional Court that resolves disputes between the two levels of governments. Such institutions ensure that one level does not change the pact unilaterally. They serve as guardians of the federal constitution by enforcing the supremacy clause. They give life to the constitution and federalism and the absence of which may result in constitutions without constitutionalism and a federation without federalism. Thus it is hardly possible to find a functioning and healthy federalism without a constitutional court or Supreme Court.

Perhaps an equally important factor that explains the differences in emphasis among the federations, despite the common structural forms are the values for which each federal system is set up. As later chapters will illustrate some federations are designed with a view to accommodate ethno-linguistic diversity and to forge unity out of diversity. In this regard federalism is considered as a means of conflict management. In multicultural federations, the political expression of diversity is a key factor in this regard. For sure, not all federations give equal political expression to diversity but the greater the level of political mobilization of diversity in a federation, the greater seems to be the need to find institutions that politically absorb that diversity. In some federations, there is manifestation of diversity without empowering it while in others the federations focus to empower particular groups. While the emphasis on some federations may be to bring together formerly independent states or to provide accessible government or to politically subdivide a geographically sizable country, in others it is main role may to manage diversity. Certainly all federations may have economic as well as political calculations in joining a federation. Integrated economic policies, improved means of communication, elimination of unproductive competition and expansion of markets are linked to the economic advantages anticipated by each constituent region. The

choice of a federal system may also have political motives, like the desire for independence from foreign powers or the need for protection against foreign powers or perhaps to have a bigger say in the international arena and in the global world. In the United States for instance it was introduced to avoid power tyranny at the center and the Allied forces used the same rationale to decentralize power in Germany.

As already mentioned, the process in which each federal system evolved and the way each federal system adapts over the years also remain as relevant indicators explaining the divergent pathways of the federal systems. Any or a combination of these values could serve as a background for establishing a federation and depending on the emphasis on one or the other, federal systems may evolve differently over a period of time.¹⁹⁸

2.7 CONCLUSION

The commonly shared features among federations as a specific form of political system could be summarized then as follows.

Firstly, there must exist two or more orders of government each acting within its constitutionally defined sphere directly on its citizen.

Secondly, a formal constitutional division of legislative, executive, judicial and financial matters between the two orders of government ensuring some area of genuine autonomy for each order is vital. Considering the theoretical difficulties with the co-ordinate theory and observing federal practice, federalism emerges if the desires for the common good or unity predominate, albeit slightly, over the forces of diversity. The supremacy of federal law over state law, a logical corollary of this notion, missing in the Ethiopian constitution, has therefore more than symbolic significance. It is an important governing rule in a federation.

Thirdly, a supreme and written constitution not unilaterally amendable by one order of government but rather requiring the participation of the federal and the constituent states ensures not only the division of power but also the continued interest of the actors in the federal process.

Fourthly, an umpire to rule on the interpretation of cases involving the division of power specifically and on the rule of constitutionality in general, guarantees the rule of law to the contending actors.

¹⁹⁸ Cheryl Saunders, 'Constitutional Arrangements of Federal Systems,' *Publius: The Journal of Federalism* 25:2 (Spring 1995) at 62.

Fifthly, processes and institutions to facilitate intergovernmental collaboration in those areas where governmental responsibilities are shared or overlap is also important. These general features, however, are moderated by the extra-constitutional factors that explain the divergent pathways of the federations.

Last but not least, almost all federations have provisions for representation of regional interests in the federal policy-making process and this is often done through the second chambers based on the principle of territorial representation as distinct from the lower house commonly composed on the basis of population size. The next chapter takes up this point. Yet as outlined briefly, federalism is beyond the institutions and its success or failure depends on many other factors that are hinted here but developed further in subsequent chapters.



Federations and Second Chambers

This chapter is in essence a continuation of the general discussion on federalism and federations covered in the preceding chapter. Entrenched representation of sub units in federal institutions is key pillar of federations and this is often done through second chambers, though other federal institutions must also be representative of the states (consociational arrangements, intergovernmental and party platforms, the federal character principle in Nigeria, equitable representation of states in federal institutions—Article 39(3) of Ethiopia are examples). In this sense it is part of the conceptual discussion undertaken in the preceding chapter on federations, this time focusing on second chambers. It is argued that a second chamber¹ based on a different composition than the first chamber and representing the interests of states, more specifically less populous states, is an institution that reflects the principle of shared rule and the normative diversity inherent in federalism. This chapter, comparative in its

¹ There is a danger in using the expression second chamber. In some countries it may refer to the popularly elected lower house. In this chapter, the second chamber (upper house) does not refer to the popularly elected lower house or what is commonly described as the House of Representatives. It is meant to refer to the other house whose members (as in the United States and Switzerland Senate) are directly elected or to those indirectly chosen as in the Ethiopian House of Federation, the German *Bundesrat* or the Indian Senate.

approach, commences by considering the underlying rationale for having second chambers and then proceeds to their manner of composition, election and more importantly, the powers entrusted upon them by their respective constitutions. The main point that the author develops is the idea that the Ethiopian Constitution, by establishing a non-legislative upper house, runs the risk of concentration of power at the center, to the exclusion of the states, and consequently departs from the federal tradition and betrays the states. Regional states have no role in the federal policy making process. The Constitution fails to ensure the constituent units' proper place in the institutions of power sharing as well as in the process of policy-making at federal level and by doing so it betrays the federal idea significantly. It has serious design flaws. The House of Federation (HoF) can be assessed from design and actual performance perspectives: the main focus of this chapter. It can also be assessed from its role in resolution of constitutional disputes, an issue discussed in the last chapter. As the brief discussion on South African National Council of Provinces shows, however, right design does not necessarily ensure good outcomes in terms of ensuring regional state interests in the federal law and policy making process. The nature of the party politics remains a critical factor in addition to the design issue.

3.1 RATIONALE

Bicameral houses in unitary systems have existed for centuries performing different functions but it is only with the establishment of the US Senate along with the 1789 Constitution that the link between federalism and second chambers became well established. Yet second chambers in federations exist in many varieties. Their composition, mandate, the process of electing/selecting and the interests they claim to represent differ significantly. Owing to the federal idea and the principle of representation of states in federal institutions, second chambers are more common, if not inherent in federations. The lower house is often uniformly organized on the democratic principle of 'one man/woman—one vote' and there is little that links it with federalism. But the upper chamber is often expected to reflect some federal idea as it often claims to represent the constituent units. In the most ideal of circumstances, second chambers in federations can have at least two basic roles. They can safeguard autonomy of regional state interests against encroachment by federal government in the process of law and policy making. As in Germany and partly South Africa,

federal law making process requires taking into account constituent unit autonomy as the latter through the second chamber check whether draft federal law initiated in the other House does not encroach regional state competence. Indeed, the second chamber in Germany as will be shown later has veto power on matters that affect sub unit interests and could block draft federal law if it violates regional state mandates. Second chambers can also serve as a platform for making sure that regional state interests are taken into account when the federal government makes laws and policies as regional state participate in the process. The second chamber's role in the law making process at federal level is defended from two perspectives.

The first emanates from the qualified application of the concept of sovereignty in federations. Stated otherwise, federalism as enshrining both unity and diversity qualifies to a certain extent, the 'one man, one vote' principle of democracy, particularly, in relation to the organization of the second chamber. While there may be many circumstances in federations in which majority rule is qualified, the point here is that federal arrangements by providing second chambers based on a different organizing principle from the lower house, somehow limit majority rule. Watts has rightly pointed that 'the distribution of seats in federal second chambers in terms of units may appear to counter the democratic majoritarian principle' in favor of an equally important value in federations, the promotion of diversity.² It is true that with modern federations, the people as a composite body are ultimately sovereign. However, what is distinctive about federations is not the fact that the people are viewed as sovereign, but that the expression of sovereignty is tied to the existence and entrenchment of the units in federations. Preston King states, 'In federations, the people are taken as a single entity, in one sense, but as plurality of entities in

² Ronald Watts, *The Institutions of a Federal State: Federalism and Democracy as Fundamental Counterweighing Principles*, v. 6 (Friburg: Publication of the Institute of Federalism, 1996): 21. For latest works on Second Chambers see Arthur Benz, 'Shared Rule vs Self Rule: Bi-cameralism, Power Sharing and the Joint Decision Trap,' *Perspectives on Federalism* 10:2 (2018); Francesco Palermo, 'Beyond Second Chambers: Alternative Representation of Territorial Interests and Their Reasons,' *Perspectives on Federalism* 10:2 (2018); Yonatan Fessha, 'Second Chamber as Site of Legislative Intergovernmental Relations: An African Federation in Comparative Perspective,' *Regional and Federal Studies* 31:4 (2021).

another. The people are represented as *whole* and as *parts*.³ Thus the federal parliament in a federation is expected to reflect the unity of the country in the lower house (elected by a popular vote) on the one hand and the diversity of the country in an upper house representing the states or some other regional interest, on the other.⁴ Accordingly, federations are designed carefully with institutions that reflect the people as a whole on the one hand and the people as parts, often identified as states, on the other. The second chamber should be useful and strong or else it will be useless and for it to be meaningful, it should represent the federal principle promoting the interests of the states as distinct from the democratic principle. The people then are taken as both united and as diverse. This way, the dual existence of unity and diversity inherent in the federal principle is reflected in the institutional design in concrete terms.⁵

From this developed the idea that federations are important institutions for the protection of powers designated to states. 'Second chambers in federations provide a protective mechanism against federal derogation and the overstepping of delegated authority, and the impairment of the interests of one or more of the units. The protective mechanism is necessary because smaller and more sparsely populated units feel potentially threatened by more densely populated states.'⁶ In this sense, federations are said to be 'polyarchic' in which not only individual citizens have an equal entitlement to vote but states also enjoy some form of right to influence the federal decision-making process, as compared to situations in ordinary democracy, where one can imagine the constitutive right bearers are individual citizens alone.⁷

Representation by territories and representation by size of population as distinct principles, operate in federations. It is for this reason

³ Preston King, 'Federation and Representation,' in M. Burgess and A. Gagnon eds., *Comparative Federalism and Federation* (London: Harvester, 1993): 95–96, hereinafter referred to as *Federation and Representation*.

⁴ Rejean Pelletier, 'Federalism and Upper Houses: Searching for a Solution,' in Lloyd Brown-John ed., *Centralizing and Decentralizing Trends in Federal States* (Lanham: University Press of America, 1988): 63.

⁵ King, *Federation and Representation* (n 3): 95–96.

⁶ P.A.H. Labuschagne, 'The Role of the Second Chamber or Upper House in a Federation,' in D.J. Kriek ed., *Federalism: The Solution? Principles and Proposals* (Pretoria: HSRC Publishers, 1992): 71.

⁷ Preston King, *Federalism and Federation* (London: Croom Helm 1982): 91; hereinafter referred to as *Federalism and Federation*.

that second chambers are defended. As Watts stated, bicameral legislature enables different principles of composition and election in the two chambers and accordingly the federal legislature may represent both the unity and the regional diversity of the federation.⁸ It is for this reason that King considers federations to be distinguished from other forms of states by the fact that the units in federations are represented on an entrenched basis within the federal legislature and that such representation can only be altered by extraordinary constitutional measures.⁹ However, as will be noted later, not all second chambers reflect the federal principle adequately. Indeed, there is a wide variety among them.

The second explanation for the legislative role of second chambers emanates from the idea that in federations political power is constitutionally divided between the federal government and the states. Such division of power in itself is premised on the idea that federations are principally organized on the concept of 'self-rule' for some purposes and 'shared-rule' for other purposes.¹⁰ Self-rule in a federal context means that an entity can decide certain matters autonomously over competencies within an overarching federal system. It refers to the political autonomy that sub units enjoy in a federation. It promises the accommodation of a distinct identity. It requires institutions for enforcing it and it is for this reason that constituent units are often granted with legislative, executive, financial and judicial powers and in many cases when the federal government

⁸ Ronald Watts, *New Federations: Experiments in the Commonwealth* (Oxford: Clarendon Press, 1966): 255, hereinafter referred to as *New Federations*.

⁹ King, *Federation and Representation* (n 3): 94. The Ethiopian Federation may look strange if all Constitutions are judged by King's standards. The representation in the second chamber is not on face value based on territorial basis. According to Article 61(1) of the Constitution, representation is based on nation, nationality and peoples. In short this refers to the various ethnic groups. However, if one considers other provisions of the Constitution like Articles 46 and 47, the states are principally defined on an ethno-linguistic basis and hence the net effect of nation, nationality representation may be considered as state representation, as the states are designed on such a nation, nationality basis, except that this cannot be carried to its end as not all nations and nationalities have their own states. Thus, there exists a dilemma between representing nationalities or states.

¹⁰ For a more detailed account of this notion see Thomas Stauffer and Nicole Topperwein, 'Balancing Self-Rule and Shared-Rule,' in Lidija Basta Fleiner and Thomas Fleiner eds., *Federalism and Multi-ethnic States: The Case of Switzerland*, 2nd edn, v. 16 (Bale: Helbing & Lichtenhahn, PIFF 2000): 4-74; Ronald Watts, *Comparing Federal Systems*, 2nd edn (Kingston: Queen's University Press, 1999): 6, hereinafter referred to as *Comparing Federal Systems*.

violates the autonomy and independent court could quash it declaring it as unconstitutional. Shared rule, on the other hand, refers to shared competencies as well as shared institutions through which federal units are accorded special participation and input in the decision-making process at the level of the encompassing entity. It guarantees the inclusion of distinct groups or sub units in the political process in areas where common decision is deemed necessary. In this sense, it is a means for enhancing or forging common identity. For the concept to come to fruition the existence of a shared institution is a prerequisite. The role of the second chamber is crucial in this regard but the principle of shared rule is a much broader concept that requires regional state representation in the federal executive, the civil service, army and security as well as the federal judiciary. As shown in Chapter 1, it is critical part of polity building (the hard ware) that builds the sense of belongingness of sub units in the overarching federation. Indeed one sees fundamental difference between older and emerging federations on this point. Genuine representation of sub units in federal institutions remains an issue in most emerging federations and for this reason they continue to face legitimacy crisis exposing them to fragility. There may be clause on representation in the constitution but they are either ignored (some regional states may remain marginalized) or the representation may remain merely symbolic, not real where the federal government handpicks puppets that do not represent the regional states. The post 2015 political crisis in parts of Oromia and Amhara is partly linked to this point. The then coalition members of the ruling party from the two regions were perceived as puppets not reflecting the respective interests. The war in Tigray that erupted in November 2020 is also partly the result of the federal government trying to impose a puppet government dismantling the TPLF. The principle of representation is thus a core principle in federations and if implemented seriously has the potential to enhance the participation of regional states in the law and policy making process at federal level and cement legitimacy of federal institutions and the overall federation.

The division of powers in a federation is the outcome of series of negotiations among the several actors. According to this bargaining, certain powers and functions are given to the federal government and certain other powers and functions are left to the states. The negotiations are formally conducted and are enshrined in the federal constitution. The idea of shared rule is nothing but a reflection of the concept that the constituent states are made part and parcel of the powers assigned to

the federal government in general and of the federal law-making process in particular. A more important value can be deduced from this objective of federalism. When states transfer certain powers and functions, this implies that they are part of the 'shared' rule. They are represented and accordingly participate in those powers. In this sense, one can say the negotiation or the federal bargain is not a zero-sum game to the states.¹¹ Hicks further reinforces this idea as follows: 'if we agree that a federal system has the dual role of creating *a nation* and preserving the *identity* of the units, it is clearly essential that constitutions and institutions must be appropriately devised for both purposes. One of the required institutions in a federation is the House of States'.¹²

In sum, in addition to the traditional function of guaranteeing security to the interest of states/minorities 'there is more to be read: the guarantee of states participation in the law-making functions entrusted to the federal government is an important function of federations'¹³ and this is often done by setting up second chambers. The entrenchment of the states in the federal government gives legitimacy to the reciprocal relationship between the federal government and the citizens of the various states. On the one hand, the states and the citizens have some control over the federal government, on the other hand the federal government exercises some level of direct authority over the citizens.¹⁴

Although the role of each second chamber in federations significantly varies depending upon which of the above rationales is predominant, all the federations considered in this study illustrate the case for second chambers with legislative functions. The Ethiopian Upper House is the only exception in this regard. The United States Constitution clearly makes the Senate an integral part of the legislature. It states, 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.'¹⁵ The Swiss Constitution is even more explicit in guaranteeing the Cantons'

¹¹ Labuschagne (n 6): 70. Daniel Elazar famously defined federalism as sum of shared rule and self-rule. See Daniel Elazar, *Exploring Federalism* (Tuscaloosa, AL: University of Alabama Press, 1987): 12.

¹² Ursula Hicks, *Federalism: Failure and Success: A Comparative study* (London: The Macmillan Press, 1978): 175 (emphasis original).

¹³ Labuschagne (n 6): 70.

¹⁴ King, *Federalism and Federation* (n 7): 89.

¹⁵ The US Constitution, Article 1, Section 1.

participation not only in the law-making but also in other federal affairs. 'The cantons shall participate in the decision-making process on the federal level, in particular in federal legislation.'¹⁶ The guarantee of the Cantons' role in law-making is even more specifically stated as follows: 'Subject to the rights of the people and the Cantons, the Federal Parliament is the highest authority of the Confederation.'¹⁷ And in another sub section it is stated: 'it [federal parliament] has two chambers, the House of Representatives and the Senate; which have equal powers.'¹⁸ The German Basic Law likewise guarantees the states participation in the law-making and administration of federal law. It states, 'The Länder participate through the *Bundesrat* in the legislation and administration of the federation...'¹⁹ The Indian Constitution equally states that parliament as a composite law-making body consists of the Council of States and the House of People. It declares, 'there shall be a parliament for the union which shall consist of the President and the two Houses, to be known respectively as the Council of States and the House of the People.'²⁰ Most Federal and devolved systems in Africa (South Africa, Kenya, Nigeria) also have second chambers that have a role in the law making process at federal level. What is common to all is the fact that the upper chamber is considered an important component of the federal law-making process.

The 1995 Ethiopian Constitution stands in sharp contrast in this regard. It fulfils the minimum requirement of having a second chamber but with a totally different function. Although the Constitution guarantees the various nationalities '*equitable representation*' in the federal government,²¹ close observation of Articles 39(3) and 62 reveals that the right to equitable representation in federal government only ensures the various nationalities in the federal executive, in the mostly non-legislative functions of the House of the second chamber and perhaps in other

¹⁶ Swiss Constitution Article 45 (1).

¹⁷ Ibid., Article 148(1).

¹⁸ Ibid., Article 148 (2).

¹⁹ German Basic Law Article 50.

²⁰ Indian Constitution Article 79.

²¹ Article 39(3) states as follows: 'Every Nation, Nationality, and Peoples in Ethiopia has the right to full measure of self-government which includes the right to establish institutions of government in the territory that inhabits and to equitable representation in state and *Federal Government*' (emphasis added).

federal agents, but not in the federal legislature. Even though Article 53 states that ‘there shall be two federal houses, namely the House of Peoples Representatives [HoPR] and the House of Federation [HoF]’ in the sense of having two chambers, the legislative power of the latter is very much contested. The only provisions where one may by stretch of imagination trace legislative functions are Articles 99, 62(7) and 105. Under the former, the HoF has concurrent power with the HoPR in the determination of residual powers over taxation. In essence this provision refers to reserve powers regarding unspecified future tax bases. Article 62(7) refers to the ‘division of revenues derived from joint Federal and State tax sources and the subsidies that the Federal Government may provide to the states.’ In both cases, it appears that there is a role to be played by the HoF, but it is far from clear whether this role is legislative or otherwise. In the latter at least the practice so far indicates that the function of the HoF is to set the criteria that the HoPR may use in allocating shared taxes as well as subsidies concerning fiscal transfers to the states.²² The HoF outlines the criteria to be taken into account and the HoPR considers the factors in approving the annual budget. As regards the powers of the HoF on undesignated powers of taxation (Article 99), it is far from clear whether ‘determining jointly’ by both federal houses’ is meant to include decisions incorporated by laws to be approved by both Houses or whether it falls short of that. It could be stated that both Houses will decide in a joint meeting and that decision will be the basis for the HoPR in making laws, in which case it still remains a non-legislative function.

A less frequent but important power of the HoF is the role it plays in the amendment of the Constitution. Except in these cases, which one can hardly consider to be legislative functions in the proper sense, at least not within the list of law-making functions entrusted to HoPR under Article 55(2), the HoPR remains the sole and highest law-making authority of the federal government.²³ Article 55(1) is more specific in making clear the point that the HoPR exercises exclusively the legislative functions assigned to the federal government. It declares: ‘The House of Peoples’

²² For instance the budget of the 1994 Ethiopian fiscal year [2001–2002] was independently approved by the HoPR but the criteria for allocating the budget to the different member states was separately decided by the HoF. See http://ethiopianreporter.com/amh_newspaper/htm/R357/r357new1.htm as visited on July 11, 2002.

²³ Ethiopian Constitution Article 50(3) reads, ‘The House of Peoples’ Representatives is the highest authority of the Federal Government.’

Representatives shall have the power of legislation in all matters assigned by this Constitution to Federal jurisdiction.'

As stated earlier, the right to be represented in federal government stipulated by Article 39(3) could not be pushed further to include the federal legislature. For it is clear that there is no intention to that effect. It is inescapable to conclude, therefore, that unlike the other federations, the Ethiopian Constitution fails to entrench the states or to use the terms of the Constitution, the nations, nationalities and the peoples to be part of the federal law-making process. The consent of the HoF is not a precondition for the enactment of federal legislation.²⁴ Neither of the explanations indicated earlier, for having the second chamber is incorporated in the Ethiopian Constitution. This is a major paradox. A constitution that claims to represent the 'nations, nationalities and peoples' of Ethiopia does not give them institutional avenue to participate and influence in the making of federal laws.

This is not without implications. In this regard Barbara Thomas-Woolly and Keller have rightly pointed out that the non-inclusion of the states may pose the question of legitimacy of the federal government. 'The division of authority between the center and the states may not be enough to preserve the union. This is likely to be true if the central government, which reserves for itself jurisdiction over certain matters, is in the hands of a group which differs from those who control the regional governments. This may cause great antagonism in view of which the right of those in power in the capital to decide everything for the whole country could be questioned.'²⁵ This strain could be mitigated somehow if the central government includes representatives of the states. This inclusion would lead greater legitimacy to its decisions. Jon Abbink has also rightly stated that 'the actual division of powers between the member states and the federal government as defined in the constitution is not federal enough ... the states have no role in debating policies and in proposing legislation formulated at or with the impact on the nation as a whole.'²⁶

²⁴ Paul Brietzke, 'Ethiopia's 'Leap in the Dark': Federalism and Self-Determination in the New Constitution,' *Journal of African Law* 39:1 (1995): 28.

²⁵ Barbara Thomas-Woolly and Edmond J. Keller, 'Majority Rule and Minority Rights: American Federalism and African Experience,' *The Journal of Modern African Studies* 32:3 (1994): 414.

²⁶ Jon Abbink, 'Ethnicity and Constitutionalism in Contemporary Ethiopia,' *Journal of African Law* 41:2 (1997): 168.

As the studies on the other federations will reveal, Ethiopian Constitution ‘betrays’ the federal idea significantly. It may be argued here that the role that the second chamber plays can be achieved otherwise. For instance, by taking into account regional interests in the composition of the federal cabinet, executive level co-operations between the federal government and the states or by introduction of proportionality in elections. But none of these elements are constitutionally guaranteed. There was some effort to reflect regional interests in the cabinet formation,²⁷ but that has remained a party prerogative and it is far from formal. Besides, there is ample historical record of minorities’ marginalization from political power and the center compromising sub national interests.

The territorial units have neither the minimum participatory role nor the even greater functions assigned to upper chambers. The gist of the argument is therefore that the Ethiopian Constitution needs to be reconsidered seriously to empower the HoF to be part of the federal law-making process. There are three reasons for this assertion. Primarily, cursory reading of Ethiopian history proves that one of the perennial tensions has been the strife for power between centripetal and centrifugal forces,²⁸ the latter constantly urging for local empowerment and for their fair share at the center, at times claiming the throne itself. The present arrangement addresses the problem of sub national autonomy (at least formally), but fails to incorporate the states in the law making-process at the center. There is now more than enough evidence that demonstrates that power is centralized in as far as the federal government does not allow the states to participate in the federal law making process.

Secondly, because the states are organized on a purely linguistic basis, there is an immense disparity among them in terms of population and geographic size, resources, administrative capacity and other elements of diversity. The power to legislate on federal matters is left to the exclusive authority of the HoPR organized on a majoritarian basis. As a result, the existing glaring political asymmetry among states is constitutionally further reinforced at the center. There is no mechanism for the smaller states to check the decisions of the HoPR. It is completely in the hands

²⁷ As a matter of practice the composition of federal cabinet as well as other high level positions take into account ethnic as well as religious diversity but this is largely discretion of the federal government. At times, some regional states are left out from the process.

²⁸ See for more on this Chapters 1 and 4, also M. Perham, *The Government of Ethiopia* (London: Faber & Faber limited, 1963): 267.

of the largely populated states. This became particularly clear with the emergence of the ‘Oro-Mara’ coalition in 2018 following the demise of the EPRDF.

An observer on the Ethiopian constitution has as early as the 1990s warned of this danger as follows:

The Ethiopian Constitution reflects this danger [the danger of the center being hijacked by a few more populous ethnic groups which may affect the aim of nation building] when it provides that the number of the House of Peoples’ Representatives shall not exceed 550 ... Discounting the minority seats, the number of members of HoPR will not exceed 530. ... In the HoPR, the two populous ethnic groups [the Oromos and the Amharas] could have about 304 members, a clear majority of the total membership of the HoPR. In accordance with the Constitution, unless otherwise provided, all decisions of the House shall be by a majority vote of members present and voting and the quorum requirement is the presence of more than half of the members of HoPR. Therefore, the combined vote of the Oromos and the Amharas would more than suffice for most of the business of the House.²⁹

The very constitution, which aims to protect the nations, nationalities and peoples, betrays them by leaving their destiny in the hands of the more populous regional states.

Thirdly, both the federal principle, in the sense of requiring the incorporation of the states in the federal law-making process and federal practice, at least the second chambers included in this study, support the case for a second chamber that has a role in law-making.

Despite the common rationale for having second chambers, however, there are significant variations in the manner of composition, election/appointment and more importantly in their role.

²⁹ Minase Haile, ‘The New Ethiopian Constitution: Its Impact upon Unity, Human Rights and Development,’ *Suffolk Transnational Law Review* 20:1 (1996): 4; see also *The 1994 Population and Housing Census of Ethiopia: Analytical Report*, v. II (Addis Ababa: Central Statistical Authority, 1999); Articles 54, 59 and 58 of the Ethiopian Constitution.

3.2 COMPOSITION

In terms of the basis of composition of second chambers, one observes a range of variations starting from those federations which organise on the basis of equality of territory to those federations balancing the principle of territoriality and citizen equality in the middle and those federations which are closer to the proportionality principle, on the other extreme.

In the United States, the Senate embodying the principle of equal representation of the states, notwithstanding disparities in their population, was the price that the larger states had to pay for the participation of the smaller states in the federation. When there is a wide variety among the states in population, area, wealth or other elements of diversity, a straightforward application of the democratic principle of representation according to population would result in a federal power permanently controlled by the few more populous states.³⁰ The less populous states often fight to safeguard their interests from being swamped by the legislature composed by a popularly elected lower house. Accordingly, second chambers based on equal state representation³¹ are instituted to take care of the concerns of the less populous states. It is only against this background that one understands the provisions of the US Constitution providing, 'the Senate of the United States shall be composed of *two Senators from each state...*'³² this is further reinforced under Article 5 which stipulates that '... no state, *without its consent*, shall be deprived of its equal suffrage in the Senate.' Accordingly, each of the 50 states enjoys formal equal representation in the upper house, although there is a glaring disparity, for instance, between the tiny state of Rhode Island and the most densely populated state California. The Senate with such equality among the states is designed to check the potential of majority tyranny coming from the lower house.³³ In this sense, federalism counter balances democracy and majority rule. It is not that federalism is against

³⁰ Watts, *New Federations*, supra (n 8): 257.

³¹ Campbell Sharman, 'Second Chambers,' in Herman Bakvis and William M. Chandler eds., *Federalism and the Role of the State* (Toronto: University of Toronto Press, 1987): 83.

³² United States Constitution Article I section 3(1).

³³ K.C. Wheare, *Federal Government*, 4th edn (London: Oxford University Press, 1963): 94.

democracy but rather limits the possible negative impacts of majoritarian democracy.

The same principle is adopted under the Swiss Constitution, except for introducing the notion of full and half Cantons. It states, 'The Senate shall consist of 46 delegates of the Cantons.'³⁴ Six half Cantons elect one and the remaining twenty each shall elect two senators.

The German federation represents a different principle that tries to balance the interests of the most populous states on the one hand and those of the less populous ones on the other. The Basic Law stipulates: 'The *Bundesrat* consists of members of state governments which can appoint and recall them ...'³⁵ and in another section it provides, 'each *Land* has at least three votes; Länder with a population between two to six million inhabitants have four, Länder with more than six million inhabitants five, and Länder with more than seven million inhabitants six votes.'³⁶ As can be seen from the provision of the Basic Law, the *Bundesrat's* seats are allocated on a weighted basis giving some advantage to the less populated Länder but falling short of the principle of equal representation of states. In principle all the votes of each *Land* must be cast uniformly and cannot be split.

India's Second Chamber, the Council of States, is similarly designed. The less populous states are favored but not to the point of guaranteeing equality among them. The Constitution states 'the allocation of seats in the Council of States to be filled by representatives of the states and of the union territories shall be in accordance with ... the fourth schedule.'³⁷ The schedule provides a list of states and the corresponding seats allocated to each state. In the House with 245 members, excluding the twelve appointed by the President, the smallest state is allocated one seat, while the highly populated one with thirty-four. The basis of such allocation is less clear but one can reasonably guess that it is population size. Besides, the Constitution provides for twelve other members to be appointed by the President who are well qualified in science, art, literature or social services.³⁸

³⁴ Swiss Constitution Article 150.

³⁵ German Basic Law Article 51(1).

³⁶ Ibid., Article 51(2).

³⁷ Indian Constitution Article 80(2).

³⁸ Ibid., Article 80(3).

The German and Indian approaches are in a way an attempt to counter-balance the immense inequality of the right of the citizen to vote among the several states. It is fashioned to render the votes of citizens across the states more equal. King has critically analyzed the tension between the two distinct principles of representation, the equality of states and the equal entitlement of the citizen to vote.

Within the African federal and devolved systems, the principle of equality of states (provinces or counties) is maintained in the second chamber following the US approach. Article 48 of the Nigerian Constitution states each of the Nigerian states has three representatives in the Senate. Article 98 of the Kenyan Constitution stipulates that each of the 47 Counties have one representative in the Senate. Article 60 of the South African Constitution as well provides that each province has single delegation of ten representatives in the second chamber.

In federations where the legislative representation of regions is equal, any strict equality of votes among the regions creates a necessary inequality of representation between the citizens of the different regions. And in federations where the representation of the regions is unequal, the degree of entrenchment of regional power is thus far diminished. To diminish the entrenchment of regional power is equally to increase the degree of inequality between regions. The conventional reason for diminishing the degree of unequal legislative representation between regions is, of course, to render the votes of the citizens across regions more equal. But in the end there is simply a conflict between making regions more equal, or making all citizens more equal. In any event, inequality of regional representation in the upper houses of federal legislature is only a compromise. It represents an acknowledgment of the dilemma and does not eliminate the underlying conflict between the two distinct principles of representation in play.³⁹

In sum, King concludes, 'The principle of equality of citizens is eroded where the equality of regional representation is entrenched. The principle of equality of regions is eroded where precedence is accorded to citizen equality. In a democracy, it is distinctive that citizens enjoy a right to vote on an equal basis. In a federation, viewed as a particular type of democracy, it is distinctive that representation of regions is in some manner entrenched. Federations incorporate necessarily and unavoidably

³⁹ King, *Federation and Representation* (n 3): 98–99.

some degree of inequality between the citizens of the different regions.⁴⁰ And the Indian Constitution and German Basic Law attempt to minimize the gap in the inequality between the citizens of the different states.

As can be gathered from the above paragraphs there is nothing that can universally be stated. What can only be stated with safety is that none of the federations have adopted a full measure of equality among the citizens. As Arend Lijphart suggests, strong bicameralism requires a second chamber that is dissimilar in congruence in terms of its composition and power compared to the first chamber. The incongruence is reflected by the conscious choice of providing overrepresentation to certain minorities or the smaller states of the federation.⁴¹

This leads to the assertion that the more severe the inequality in representation among the states in the upper house, the lesser the distinction in terms of composition will be in the other house and the more this defeats the rationale for having the second house in federations. This is exactly the dilemma one faces under the Ethiopian Constitution. One fails to see why the HoF should go far in endorsing almost the same principle of composition as the lower house. In terms of composition Article 61(2) of the Constitution stipulates ‘each Nation, Nationality and People shall be represented in the House of Federation by at least one member. Each Nation or Nationality shall be represented by one additional representative for each one million of its population.’ The provision does not even indicate any rational upper limits like the German one. As a result, the nationality with the largest number will have as many seats as its size may allow in the HoF. Accordingly, the organizational principle of the HoF is the same with the HoPR except that there is a significant difference in the number of constituencies, 100,000 for the former and one million for the latter. The figures indicate that more populated nationalities have more seats and that there is as such no upper limit to the number of seats.⁴² The HoF currently has 153 members representing 77 nationalities while the two cities- Addis Ababa and Dire Dawa have no representation in the House. Thus in effect, not all nationalities are represented in the HoF. As of 2005, state governors have been among the key members sent

⁴⁰ Ibid.: 101.

⁴¹ Arend Lijphart, ‘Bicameralism: Canadian Senate Reform in Comparative Perspective,’ in Bakvis and Chandler (n 31): 105.

⁴² Interview with expert of the HoF, April 15, 2020.

to represent the states/nationalities in the HoF, to decide crucial issues such as the federal subsidy. As a matter of practice, members of the HoF assemble only three a year unless there are extraordinary circumstances. This has given the impression that it is ‘a part time House’ with many issues pending its decision. As for the selection/election process, Article 61(3) envisages two possibilities. Members of the HoF may be elected indirectly by the state legislatures or the state legislature may decide the members to be elected directly by the people. So far, all members are indirectly elected by the states.⁴³

In sum, the composition of the upper chambers varies significantly, from the nearly majoritarian House of Federation in Ethiopia to that of minority protection in the US, Switzerland and most African federations, with the German and Indian Houses balancing the tension between territorial and citizen equality, in between.

3.3 SELECTION OF MEMBERS

Similar variations exist among the federations in the manner in which the members of the upper house are brought to office. In the United States, originally members of the Senate were indirectly elected by the state legislatures.⁴⁴ Wheare argued that this was a remnant of the federal legislature dependency upon the government of the states.⁴⁵ An amendment⁴⁶ of the Constitution introduced in 1913, finally declared that Senators are directly elected by the people there of. The Swiss Constitution follows the same principle of direct election of members of the Senate. Article 150 states ‘... six half Cantons elect one and the remaining twenty each shall elect two senators.’ In both federations the citizens of the states directly elect the members of the second chamber. And the states are aggregates of electors who vote directly to choose members of the second chambers. Although a balanced representation in the Council of States is not expressly provided for by any legal provision, as a matter of practice, the deputies are often chosen in such a way that they represent the cantons

⁴³ See Article 61(3) and interview with experts of the HoF 2006.

⁴⁴ Article I Section 3 reads, ‘The Senate of the United States shall be composed of two senators from each state, chosen by the legislatures thereof ...’

⁴⁵ Wheare (n 33): 3.

⁴⁶ Amendment XVII states, ‘The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years.’

two main components: the two languages, the two religions or the main parties.⁴⁷

In Germany, by virtue of Article 51 of the Basic Law the members of the *Bundesrat* are delegates of their *Land* cabinets, holding office in the federal second chamber *ex officio* as members of their *Land* executive and voting in the House in a block on the instruction of their *Land* governments. Each *Land* Government sends members of its cabinet to represent the interests of the *Land* in the *Bundesrat*. As these officials are simultaneously delegates for the *Bundesrat* and officials of the *Land* government, they can be instructed and recalled by the *Land* government.⁴⁸

South Africa's National Council of Provinces is designed more along the *Bundesrat* model. Each province has ten delegates and the delegation is a single unit expected to vote in the House in bloc. Key leaders of the provinces, members of the legislature and party members in the sub unit councils are members of the ten delegation. The fact that the delegates are required to vote as a unit and can be influenced by provincial government makes it similar with the German system but unlike the latter, there is equal representation of the states. Article 42(4) and Article 60 of the constitution also require the delegates to promote the interest of the provinces in the national law making process and in this sense is similar to the German *Bunesrat*. Yet, despite right design (second chamber based on equal representation and the duty to promote interest of states in national law making process (Article 42), the actual performance shows, the African National Congress's (ANC) dominance in all provinces except the Western Cape and an executive dominated intergovernmental system that made the second chamber victim of party politics and party interests. The second chamber has promoted party than provincial interests. In this respect as discussed in Chapter 6, the HoF also suffers from a similar problem. Most crucial issues that need balancing and promotion of regional states interests including the protection of minority rights have been subject to party prerogatives.

The Nigerian constitution Article 48 entitled each of the thirty six states to have three representatives in the Senate. The members of the Senate as in the US are directly elected. Kenya's constitution as well

⁴⁷ Nicholas Schmitt, *Federalism: The Swiss Experience* (Pretoria: HSRC Publishers, 1996): 35.

⁴⁸ Watts, *Comparing Federal Systems* (n 10): 95.

provides for direct election of each of the members of the Senate (Article 98) with the exception of the representatives of the Youth, women and persons with disabilities. In India, members of the federal second chamber are for the most part indirectly elected by the state legislature. Federal appointments are also provided as a means for ensuring representation of some particular interests and for this reason it provides for twelve such appointments out of an overall total of 250 members. Article 80 sub 4 states that the elected members of the legislative Assembly of the State shall elect the representative of each state in the council of states.

In the Ethiopian situation Article 61(3) envisages two possibilities. Members of the House of Federation may be elected indirectly by the state legislatures or the state legislature may decide the members to be elected directly by the people. So far experience indicates that all members are indirectly elected by the states.⁴⁹ As of 2005, following the election crisis, the then ruling party has decided that key leaders of the regional state including the president and influential regional state executive members are members of the HoF. Although not a legislative body, the debates related to the allocation of subsidy to regional states and disputes among regional states have made the HoF a forum for debating and deciding crucial issues that matter for the country and the engagement of the regional state actors has significantly increased.

A more fluid issue is the interest that members of the upper house represent. When one speaks of representation, it is far from clear as to what it is to be represented. The difference in the manner of election of such members seems to have had an impact to the variation of interests to be represented at federal level. In the US and Switzerland, at least initially, representation is based on the territorial principle and theoretically speaking the two representatives are expected to stand for the interests of the states.⁵⁰ In the US this was obvious before the 1913 amendment. Since then, however, it is doubtful whether the Senators represent the interest of the citizen, the state or some regional interest such as the mid west, east or the south, as the citizen directly elects them. Some cast doubts on the claim that Senators represent the States

⁴⁹ Ethiopian Constitution Article 61(3) stipulates, 'Members of the House of the Federation shall be elected by the State Councils. The State Councils may themselves elect representatives to the House of Federation, or they may hold elections to have the representatives elected by the people directly.'

⁵⁰ Sharman (n 31): 83–86.

in the federal government.⁵¹ In Switzerland too, it is possible to question how genuinely the cantons' interests are reflected in the Council of States. In principle deputies vote without instruction⁵² and they can express cantonal interests. But neither the governments of the cantons nor parliament has any political influence on the decisions of the Council of States. There is a trend that the Council of States no longer represents member states but in another form the people of Switzerland as a whole. Its deputies vote according to political ideals or personal ideas rather than in the interests of the cantons.⁵³

In Germany, as the *Bundesrat* is composed of the delegates of the executives of *Land* governments who vote as a block on the instruction of each *Land* cabinet, it appears that they represent the *Land* government, and more specifically the regionally governing party.⁵⁴

County representatives in Kenya are directly elected and seem to reflect more an independent view than of county or party interests. Although they represent the counties, there is no constitutional obligation as stipulated in the German and South African Constitution that obliges Senate members to reflect County interests.

As noted already, in South Africa, party interest seems to have taken a predominant role and the same could be said in Ethiopia. Article 61(1) of the Ethiopian Constitution provides that the HoF is composed of representatives of nations, nationalities and peoples. Membership in the HoF appears to be not based on the principle of territoriality but on what the Constitution defines namely nations, nationalities, and peoples. But the net effect as hinted above shows party interest has taken over regional

⁵¹ For instance, Duchacek argued it is debatable whether today a Senator [US] still represents his own state interests or rather multi-state interests, functions or his party. Ivo Duchacek, *Comparative Federalism: The Territorial Dimensions of Politics* (Lanham: University Press of America, 1970): 245. And for a more comprehensive critic on the role of the Senate see Lynn Baker and Samuel Dinkin, 'The Senate: An Institution Whose Time Has Gone?', *Journal of Law and Politics* 13 (1997): 21–68.

⁵² Schmitt (n 47): 33–36; see also Swiss Constitution Articles 148, 150, 156.

⁵³ Ibid.

⁵⁴ Sharman (n 31): 84.

state interests. The hegemonic nature of the ruling party and its centralized decision making process prevents the articulation of regional state interests.⁵⁵

We noted already the paradox in Ethiopia: the constitution promising the empowerment of nations and nationalities but failing to include them in the federal law making process. As will be demonstrated later with respect to the regime of fiscal transfers, the claim that the HoF represents the nationalities is merely rhetoric.⁵⁶

In the light of the above discussion, it can be stated that the federal role of the second chamber may range from being the forum for expressing the preference of state governments (Germany) to being an institution directly reflecting a pattern of electoral preference weighted in favor of the residents of the smaller units of the federation (Switzerland and the US) and pretension of house of nationalities in Ethiopia.⁵⁷

3.4 POWERS

The difference between second chambers is even more obviously seen when one looks at their constitutionally assigned roles in the law-making process in general and other powers in particular. It is not clear whether or not the second chamber is to function as co-equal legislature as in the lower house, in the sense of guaranteeing both participation and protection of regional state interests or is required to remain a subsidiary house, for instance only making sure that the interests of states are taken into account in the process. A three-fold classification can be made in this respect.

There are those that are fully symmetrical second houses as in the US and Switzerland where the two chambers are co-equal in power and are directly elected. These are at times called symmetric or perfect bicameral houses because the second chambers enjoy equal power with the lower house. We have already seen that in the United States all legislative powers are vested in both houses. Furthermore, the Senate is vested with additional important non-legislative functions. Upon institution of

⁵⁵ Compare with Fasil Nahum, *Constitution for Nation of Nations: The Ethiopian Prospect* (Lawrenceville, NJ: The Red Sea Press, 1997): 51.

⁵⁶ Ibid.: 52.

⁵⁷ Sharman (n 31): 84.

charges by the lower house, the Senate has the sole power to try impeachment.⁵⁸ It has equal powers in all bills including money bills, except that it is introduced in the House of Representatives. In addition, the advice and consent of the Senate (two-thirds vote) is a requirement for the approval of treaties concluded by the President. The President's power to conclude international treaties is limited⁵⁹ to a great extent by the role of the Senate. The Senate has a similar role in the appointment of ambassadors, or other ministers, consuls, and judges of the Supreme Court.⁶⁰ The Senate thus enjoys equal powers in the law making process and has crucial non legislative functions.

The Swiss Council of States is equally empowered in all legislative affairs. It has exactly the same power as the lower house and both houses play the same role in the selection of the Federal Council. In Switzerland, like the US, small cantons have through the second chamber an opportunity to check the influence of the more populated cantons, regardless of population size.⁶¹ The Swiss Council of State, as it is called, enjoys equal status with regard to initiating and passing legislation; neither House dominates in the process of legislation. Like the United States both chambers are composed differently. And as can be seen from the Constitution, both houses have the same competence and they deliberate separately.⁶² As in the Senate of the US, the Swiss Council of States under Article 166 is empowered to engaged and approve in foreign affairs including international treaties.

In both the United States and Switzerland, the power of the Senate is further reinforced by the separation of powers between the legislature and the executive. Their equality is seen in matters of legislation, no law

⁵⁸ US Constitution Article I Section 3(6) states, 'The Senate shall have the sole power to try all impeachments ... and no person shall be convicted without the concurrence of two thirds of the members present.'

⁵⁹ US Constitution Article II Section 2(2) 'He [the president] shall have power with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators concur; and shall nominate, with the advice and consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, judges of the Supreme Court ...'

⁶⁰ Ibid., See also Labuschagne (n 6): 77–78.

⁶¹ Thomas Fleiner, 'Switzerland: Constitution of the Federal State and the Cantons,' in Lidija Basta and Thomas Fleiner eds., *Federalism and Multiethnic States: The Case of Switzerland*, v. 16 (Fribourg: Institute of Federalism 1996): 81.

⁶² Swiss Constitution Articles 148, 149, 150, 156; see also Schmitt, *supra* note 47 at 32.

can be enacted unless both houses agree on the same text. Legislative acts and almost all other decisions of the legislature may only be enforced if they have the approval of both chambers. In case of deadlock between both houses, a committee composed from the two houses mediates the different interests and attempts to narrow down the contending positions. If that fails the draft law will be dropped. The Nigerian Senate is designed more or less along the US model as it enjoys equal power with the other chamber and is also composed of equal number of representatives (Articles 47 and 48).

The German *Bundesrat* belongs to the second group. It represents one of the more effective houses in a parliamentary system. Composed of representatives of the executives of the *Länder*, usually ministers of the *Land* cabinet, it has perfectly combined the participatory role as well as the protection function. Its particular membership as well as the fact that it has absolute veto over all federal legislation involving administration by the *Länder* has contributed to the success of this house.⁶³ It is allowed to initiate legislation, it has the right to examine and comment on all bills proposed by the federal government before they are submitted to the *Bundestag* [lower house]. *Bundesrat* has also crucial non legislative functions. The Basic Law Article 59(2) mandates the *Bundesrat* to engage in treaties and international affairs and by virtue of Article 84(1) it has the mandate to appoint half of the members of the Constitutional Court. It has also the mandate to scrutinize and oversight members of the executive (Article 53). Beyond this its role in the law making process remains remarkable.

The type of bill proposed determines the power exercised by the *Bundesrat*. The Basic Law makes a distinction between those bills which require the consent of the *Bundesrat* to become a law and those where its objection could be overridden by an equivalent majority of the lower house. In the latter category of laws, the *Bundesrat* has the right to participate but only with a suspensive veto. If the *Bundesrat* objects to the proposed bill, the *Bundestag* can overrule it with the same majority which the former house applied to approve or reject. In other words, a simple majority in the Lower house can reject what has been approved by a simple majority in *Bundesrat*. The latter is given with an upper hand. However, in the case of bills that require the consent of the upper house,

⁶³ Watts, *Comparing Federal Systems* (n 10): 96.

the *Bundesrat* has absolute veto.⁶⁴ In general, a bill requires the consent of the upper chamber if it has financial implications or affects the duties of the Länder or lays down administrative procedures for them in their function of implementing federal legislation. The *Bundesrat*, however, took an expansionist view of what constituted an administrative procedure and regarded the presence in a lengthy bill of a single clause requiring its consent as being sufficient to give it an absolute veto over the bill as a whole.⁶⁵ In practice this covers more than 60% of all federal legislation. The reason for such an increased role of the *Bundesrat* in influencing federal legislation requiring its consent is that a series of constitutional amendments over the years transferred powers that traditionally belonged to the states. Giving the *Bundesrat* an absolute veto is part of the attempt to compensate the incursion on state autonomy.⁶⁶ In this category of laws, the final say is reserved for the upper house, not even a unanimous vote of the lower house could pass the law, so long as it is not approved by the former. It is important to note that the German federation is unique in the sense that the Länder play a very crucial role in the administration of federal law, compared to other federations like the United States where it employs a large number of federal agents for executing federal laws.⁶⁷ German federalism is often uniquely described as ‘executive federalism,’ signifying the fact that federal government is predominantly responsible for legislating most of the laws while the states are responsible for implementing such laws.⁶⁸ Consequently, in constitutional terms and practice, the *Bundesrat* is both the legislative organ of the Länder at federal level and at the same time, the federal organ of administration in the ‘whole state.’ This dual role has its origin in the twofold effect of Articles 50

⁶⁴ See Articles 77, 83 and 84 of the German Basic Law.

⁶⁵ Philip Blair, ‘Federalism, Legalism and Political Reality: The Record of the Federal Constitutional Court,’ in Charlie Jeffery and Peter Savigear eds., *German Federalism Today* (New York: St. Martin’s Press, 1991): 70–71.

⁶⁶ Tony Burkett, ‘The Ambivalent Role of the Bundesrat in the West German Federation,’ in Michael Burgess ed., *Federalism and Federation in Western Europe* (Croom Helm: Harvester 1986): 210; see also David Currie, *The Constitution of the Federal Republic of Germany* (Chicago: The University of Chicago Press, 1994): 61–65.

⁶⁷ Burkett (n 66): 211.

⁶⁸ Uwe Leonardy, ‘The Working Relationship Between Bund and Lander in the Federal Republic of Germany,’ in Charlie Jeffery and Peter Savigear eds., *German Federalism Today* (New York: St. Martin’s Press, 1991): 40–59; Daniel Halberstam and Roderick Hills Jr., ‘State Autonomy in Germany and the United States,’ *Annals* 574 (2001): 173–178.

and 84 of the Basic Law. Article 50 clearly stipulates that the Länder shall participate through the upper house in the legislation and administration of the federation. Article 84 states all federal statutes which regulate the institutional and/or procedural aspects of the role of the Länder in the execution of those statutes, require the consent of the *Bundesrat*. Thus, the role of the upper chamber is a double one in a double field. It is both that of co-legislature with the lower house and of representative of the Länder in their function as administrators of federal legislation.⁶⁹

According to Sharman the upper house representing the government of the *Land* makes it radically different from other second chambers in parliamentary systems.⁷⁰ It is constituted under the assumption that there is a possibility of conflict between the national executive based on the majority in the lower house and a differing state based majority in the upper house. By dividing *their roles* on the law-making process it introduced the possibility of accommodation between the two levels of government within the national legislature. This also proves the case that second chambers in parliamentary systems do not necessarily become weaker compared to their counterparts in Presidential systems.⁷¹ It is

⁶⁹ Leonardy, *supra* note 68 at 46; Article 50 was amended in 1994 thus enhancing the role of the *Bundesrat* not only in the traditional role of legislation and administration of federal laws but also in matters of European union (see Chapter 6 for more on this and also Article 23 of the Basic Law). Schneider argues that the *Bundesrat*, not the Länder was the winner in the 1994 Constitutional reform. Its veto powers further expanded to include legal regulation of state liability, of the railway system, local public transport, the postal services and telecommunications (Articles 72/2, 80/2, 87e/5, 87f/1, 106a, 143a/3, 143b/2 of the Basic Law); Hans-Peter Schneider, 'German Unification and the Federal System: The Challenges of Reform,' in Charlie Jeffery ed., *Recasting German Federalism: The Legacies of Unification* (London: Pinter, 1999): 78.

⁷⁰ Sharman (n 31): 87.

⁷¹ According to some authorities, the variation in the manner of election of second chambers is not without implications. To a certain degree it affects the democratic legitimacy of second chambers and certainly its power. The argument goes as follows: compared to members of the lower chamber who are directly elected by the voters, the indirectly elected members of the second chambers 'lack the democratic legitimacy and the real political influence, that popular election can confer'. Lijphart (n 41): 103. A wealth of literature seems to suggest this. It is stated that second chambers in parliamentary systems are weaker compared to their counterparts in presidential systems. Another author notes, 'on the matter of upper houses it is difficult to reconcile federalism with parliamentary government. In such a hybrid system an upper house can be only a house subordinate to the lower house which possesses a much greater political legitimacy ... such a house possesses fewer powers in a parliamentary system but greater powers in a presidential one.'

an innovation in the organization of the second chambers. It articulates *Land* rights over federal law and to this effect it uses its veto and powers to amend. The *Bundesrat* exists not only as a check and to exercise a veto on federal government but also as its partner with a suspensive veto in the federal law-making process.⁷²

Pelletier (n 4): 68; 72 other views include: 'owing to the democratic principle, the executive is often responsible only to the lower house. The house that controls the executive inevitably has more power than the other. This is the consequence of the fusion of powers between the legislature and the executive in such systems. They make the Prime Minister and his cabinet responsible to the lower house. Only the popularly elected, non-federal lower house makes and unmakes cabinets.' Watts, *Comparing Federal Systems*, supra note 10 at 96. Moreover, certain laws are required to be initiated only in the lower house. In India for example, the powers of the second chamber in relation to money bills are limited, a money bill can be delayed by the second chamber for only two weeks. Ibid. In case of conflicts between the two houses over a bill, provisions are clearly made to limit the power of the second chamber to only a suspensive veto. It is usually the lower house that has the last word in legislative matters. 'The refusal by the upper house to go alone may be overridden after a prescribed period of time.' Duchacek, supra note 51 at 249. In addition, where there are matters that need joint sittings, the lesser number of the members of the second chamber place it to a subsidiary position. Lastly, votes in the second chamber could be cast more on party lines than upon state basis. The existence of a system of cabinet governments where the executive requires the support of a party in the legislature makes party interests more important than state interests. Such a situation may cripple the upper house in that it is no longer fully capable of protecting smaller units within a federation. As a result it is stated that in parliamentary systems, the upper house acts primarily in the interests of political parties rather than those of states. Labuschagne (n 6): 74. This is reinforced by the usual strength of party discipline within parliamentary federations, where the same party dominates both houses; there is little room for an upper house with a mind of its own and a partisan backing at odds with the government of the day. Wheare, supra note 33 at 94. These points cast some doubt on the competence of second chambers in parliamentary federations to provide sufficient regional influence in the central decision-making process. However, the case of the German *Bundesrat* clearly indicates that this assertion is not universally true. It represents a very interesting case that stands to justify the point that it is still possible to organize an innovative second chamber that could serve as a watchdog for the interest desired to be safeguarded at federal level while at the same time acting as a partner in the law-making process.

⁷² At the time of writing of this thesis (summer of 2004 in Heidelberg, Germany), colleagues at the Max Planck Institute mentioned to the author that a Commission is considering proposals to revise the powers of the *Bundesrat* as well as to transfer some responsibilities from the *Bund* to the *Länder*. At the time of writing the *Bund* was dominated by Social Democrats and the *Länder* governments by Christian Democrats. Thus, there was political deadlock in the two federal houses which some consider as resulting from wide powers of the *Bundesrat*.

The South African and Kenyan Second chambers are designed along the same principles although in terms of effectiveness far from the *Bundesrat*. In Kenya, the Senate has the additional mandate of deciding the basis for the allocation of the share of National revenue that goes to the Counties (Articles 98, 217). In addition if the law under consideration impacts the counties (special bill), two-third of both houses must agree for the bill to pass. The Senate thus has the mandate to promote and protect County interests and in this sense has some similarities with the South African second chamber.

The second chamber of India with subsidiary power and playing a precipitate function in the law-making process represents a third group. It represents a second chamber with a general power to revise legislation potentially able to amend bills but only with a suspensive veto. Although there appears to be a difference of opinion about the Indian Council of State, the constitutional provisions confirm the idea that the upper house has a reversionary function. According to Sharma, the House enjoys an even greater authority, going beyond the co-equal legislative role, compared to the lower house.⁷³ It is true that the Constitution stipulates, 'bills shall not be deemed to have passed by the houses of parliament unless it has been agreed to by both houses, either without amendment or with such amendments only as are agreed to by both houses.'⁷⁴ The House also has important powers in amending the Constitution under Article 368. It is also the sole house that can pass binding decisions calling parliament to enact law-covering matters included in the state list.⁷⁵ However, the powers of the same House are also severely limited by the qualifications introduced under Articles 108 and 109. In the latter, money bills are not only introduced in the lower house but

⁷³ B.M. Sharma, *The Republic of India: Constitution and Government* (Bombay: Asia Publishing House, 1966): 276. Watts on the other hand argues that it is a typical parliamentary upper house with only subsidiary function, *Comparing Federal Systems* (n 10): 96.

⁷⁴ Indian Constitution Article 107(2). The provision, however, commences by a serious qualification subjecting this power to other Articles 108 and 109 regarding joint sittings and money bills.

⁷⁵ Indian Constitution Article 249 (1).

the last say is also reserved to it. The refusal of the upper house has no serious implications for the lower house may or may not endorse them, at its discretion. The upper house has only a suspensive veto; its concurrence is not required to pass all new laws. Under Article 108, in matters involving joint meetings, for instance disagreements on a bill, the fact that such a meeting requires only a simple majority and that the members of the upper house are almost half compared to the lower house, clearly indicates the dependency of the upper house on the other.⁷⁶

With a completely different role, the Ethiopian HoF appears to stand as a fourth category. It should be mentioned at the outset that most of its functions are non-legislative: fiscal issues, serving as a forum for constitutional interpretation and intergovernmental affairs, promoting unity and solidarity among the different groups; and addressing minority rights demand for recognition and self-government. Some of the issues are briefly discussed here and the other sections other chapters of this book. Some of the important powers conferred to the House under Article 62 include constitutional interpretation and organizing the Council of Constitutional Inquiry. According to the Constitution, it is believed that, constitutional interpretation is considered as a political rather than a judicial function. Explanations can be inferred from Articles 8 and 61. Article 8 stipulates, 'All sovereign power resides in the nations, nationalities and peoples of Ethiopia.' And Article 61(1) provides the fact that the House is composed of such diverse nationalities. By inference it can be concluded that, if sovereignty is placed on the nationalities and because the nationalities are sources of sovereignty, the house, which reflects their sovereignty, must interpret the constitution. This author has elsewhere argued that the House has become an instrument of those who hold power at the center failing to enforce the supremacy of the constitution, particularly in cases involving enforcement of fundamental rights and freedoms.⁷⁷ The HoF is by design a political institution and cannot serve as an impartial arbiter. Besides, the fact that members of the House are at the same time active members within the regional government, only visiting the Capital when there are calls for a meeting, often three times a year, raises doubt about

⁷⁶ Watts, *Comparing Federal Systems* (n 10): 96.

⁷⁷ Assefa Fiseha, 'Constitutional Adjudication Through Second Chamber in Ethiopia,' *Ethnopolitics* 16:3 (2017): 1–19. <https://doi.org/10.1080/17449057.2016.1254407>.

its institutional competence as a regular federal body. It is perhaps in the area of fiscal federalism that the HoF could be considered important.

We noted already, one of the prime roles of the second chambers in federations is promoting shared rule in federal institutions as it claims to represent and promote sub national interests. It is here where one finds difference between advanced federation in the west and the emerging federations in Africa. Compared to the advanced federations considered above where the principle of representation and shared rule are taken seriously, federal and devolved systems in Africa face distinct problem because of the failure to institutionalise power and the centralized nature of power. In all four federations in Africa (Ethiopia, Nigeria, South Africa, Kenya) there is an effort to have an inclusive federal government. In reality, however, the federal government is *perceived* as belonging to one dominant group and thus continues to face legitimacy crisis. Left outs continue to threaten the central government. For instance, since the establishment of the Ethiopian federation, both as a result of constitutional principle (Article 39(3)) and practice, there has been an attempt to reflect the country's diversity in the establishment of the executive. The issue, however, is representation meant for some only in the nominal and not real sense. The two coalition members of the ruling party that led the Oromia and Amhara regional states in particular faced serious legitimacy crisis until recently and thus a section of the Oromo and Amhara used to think they were not genuinely represented in the federal institutions; hence the narrative of marginalization and protests since 2015.

In nearly all African federations and this includes Ethiopia as well, the federal principle of *representation* has never been genuinely implemented. The constitutional clauses contain some element of representation. Nigeria has the 'federal character' (Article 4 sub 4), Kenya 'institutions should manifest Kenya's diversity' (Article 91), Ethiopia the right to equitable representation of nationalities (Article 39 sub 3) in federal institutions. However, the representation becomes more symbolic than genuine. In many cases it is the federal government that *handpicks* the 'representatives' instead of leaving the matter for the subunits to designate their genuine delegates in the federal institutions. This has been a major paradox in Ethiopia for example as the 'representatives' do not have legitimacy in the eyes of the people of the states. Despite the rhetoric

of representation of sub units in federal institutions, inclusive and broad based federal government remains a scarce commodity demonstrating the fragile nature of the federal and devolved systems. Not inclusive federal government in a divided society means it is perceived as belonging to some and not all and with it comes legitimacy crisis explained earlier. To stay in power, federal government resorts to brute force.

Second chambers take a special role in representing states in the law making process at federal level and in airing out their voices. This is particularly critical when the federal government designs law and policies that may affect the interest of the states. In addition to airing their concerns, constituent units can also block the other house when it exceeds its mandate and impacts their autonomy. The second chamber thus safeguards the interests of the states. The basic principle that guides federations is that irrespective of their population size, the states are represented on equal basis. Thus in Nigeria, there are three senators from each state (Article 48) while in Kenya, each county has one representative in the Senate (Article 98). In South Africa, each province has ten representatives in the National Council of Provinces (Article 60). The HoF is distinct in two respects: it has no law making function but has wide powers in resolving intergroup conflicts although in reality it is least explored because its members are not full time. It also enjoys wide powers in the allocation of subsidy that the federal government allocates to the states—the main source of states revenue. Secondly the representation is not based on equality. It is majoritarian house where each nationality has one seat but for every additional one million, there is one more seat. The fact that states in Ethiopia have no law making functions means that the federal government can easily enact laws that affect autonomy of states and in the absence a constitutional court that impartially umpires inter-governmental disputes, the system leaves states at the mercy of the federal government.

The experiences in Nigeria, Kenya and South Africa are relevant in this regard. The states have a role in the law making process at federal level and they all have either a constitutional court (South Africa) or Supreme Court (Kenya and Nigeria) to address intergovernmental disputes in an impartial manner. Institutions that enforce the supremacy of the constitution, the rule of law and that umpire intergovernmental disputes impartially are indeed vital preconditions for the operation and development of federations. These institutions give life to the powers allocated to the two levels of governments and thereby allow the federation to evolve within bounds. Such institution keeps the federation on balance and gives concrete meaning to the division of powers. In Africa, political power is yet to be tamed and institutionalized. The big man or the dominant party at the center is a major obstacle to federalism, power sharing and separation of powers. Independent institutions such as supreme courts or constitutional courts play vital role in limiting power and in institutionalizing it. South Africa and Kenya have gone some steps but Ethiopia is far behind in this respect and the federation has largely been open to political manipulation.

3.5 THE ROLE OF THE HoF IN INTERGOVERNMENTAL RELATIONS

Fiscal federalism is by and large a concept derived from economics governing the allocation of revenue and expenditure responsibilities between federal and state governments and it also attempts to deal with the system of intergovernmental transfers between the federal government and the states as well as among the states. However, although the theory might provide scientific basis for sorting out federal, state and local roles,

in practice it is hindered by other values of federalism⁷⁸ such as accommodation of diversity, conflict management, solidarity and so on. The values of fiscal federalism often come into conflict with other values of federalism.⁷⁹

⁷⁸ The values of federalism as well as the specific objective of fiscal transfers might differ from one federal system to another. For example in Germany and Switzerland, fiscal transfers aim at creating more equitable life standards among the citizens as well as among the states. This brings us to the brief consideration of the regime of co-operative vs. competitive federalism. There are costs and benefits associated with each. Advocates of competitive federalism argue that just as economic competition produces superior benefits compared to monopolies or oligarchies, so competition between governments serving the same citizens is likely to provide citizens with a better service. They equate co-operative federalism with collusion directed at serving the interests of governments rather than of citizens. It must be noted though that excess of competitive federalism can lead to intergovernmental conflict and acrimony and have a divergent effect within a federation. If one looks at the Swiss system of equalization and makes a comparison with the United States regime of co-operative federalism, looking at the social security as well as education systems, there are equalizing policies for the various cantons. Swiss and German co-operative federalism is based on the commonwealth of states. They are based on regional solidarity rather than competition. On the other hand, American co-operative federalism is based on the economic theory of competition. Accordingly, governments have to compete and citizens have the option to vote with their *feet* for the government they prefer. The variety among the states in the United States is something that is promoted and encourages individuals to migrate from east to west or north to south and as a result make the best choices they can. The Swiss approach is different. People feel very much attached to the communes and regions in which they live and many would prefer to stay in their own region rather than accept better jobs elsewhere. Besides, there are the language boundaries. Thus it aims at creating fairly equal living conditions in the different states to protect collective values of local culture and it is not based on competition or on voting with one's feet by migrating. By compensating for existing inequalities, Swiss federalism makes it possible for people to stay in their own communes and opt for loyalty. Despite post unification challenges, German federalism as well has clear constitutional provisions that aim at establishing uniform living conditions throughout the federation. See Basic Law Articles 72, 104 and 106. See Charlie Jeffery, 'German Federalism from Co-operation to Competition,' in Maiken Umbach ed., *German Federalism, Past, Present, Future* (Houndmills: Palgrave, 2002): 170–178; also Wolf Linder, *Swiss Democracy: Possible Solutions to Conflict in Multicultural Societies*, 2nd edn (New York: St. Martin's Press 1998): 63–64; John Kincaid, 'American Experience in the Theory and Practice of Fiscal Federalism,' in Douglas Verney and Balveg Arora eds., *Multiple Identities in a Single State: Indian Federalism in Comparative Perspective* (Delhi: Konark Publishers Pvt. Ltd. 1995): 324–340; also Hans Mackenstein and Charlie Jeffery, 'Financial Equalization in the 1990s: On the Road Back to Karlsruhe?' in Charlie Jeffery ed., *Recasting German Federalism: The Legacies of Unification* (London: Pinter, 1999): 155–176.

⁷⁹ For more on the values of federalism see Chapters 2 and 4.

The Ethiopian Constitution provides a separate regime of allocation of powers of taxation distinct from the technique for allocation of other powers.⁸⁰ As far as the powers of taxation are concerned, the Constitution stipulates separate powers of taxation for the federal government,⁸¹ another separate list for the states,⁸² concurrent power of taxation for both governments⁸³ and finally leaves undesignated powers of taxation to

⁸⁰ While Articles 51 and 52 stipulate that the federal government has enumerated powers and grant residual power to the states, this technique is not to be applied in the regime of fiscal federalism because the Constitution expressly provided a different principle under Articles 94–99.

⁸¹ Article 96 stipulates the following as federal powers of taxation: customs duties, taxes and other charges on imports and exports, income tax on employees of the federal government and international organizations, income, profit, sales and excise taxes on enterprises owned by the federal government, income and winnings of national lotteries and other games of chance, taxes on the income of air, rail and sea transport services, taxes on the income of houses and properties owned by the federal government and rents collected from the same, fees and charges relating to licenses issued and services rendered by organs of the federal government, taxes on monopolies and federal stamp duties.

⁸² Among other things Article 97 states that states shall levy and collect income taxes on employees of the state and of private enterprises, fees for land usufructuary rights, taxes on the incomes of private farmers and farmers incorporated in co-operative associations, profit and sales taxes on individual traders carrying out a business within their territory, taxes on income from transport services on waters within their territory, taxes on income derived from private houses and other properties within the state, profit, sales, excise and personal taxes; income taxes on income of enterprises owned by the states, fees and charges relating to licenses issued and services rendered by state organs, and royalties for use of forest resources.

⁸³ Article 98 provides: ‘Federal government and the states shall jointly levy and collect profit, sales, excise and personal income taxes on enterprises they jointly establish, taxes on profits of companies and on dividends due to shareholders, taxes on incomes derived from large scale mining and all petroleum and gas operations, and royalties on such operations.’ However, this Article has ‘unofficially’ been amended in 1997. At least two reasons were provided for its amendment. It was stressed that most of the activities taxed under this Article relate to activities with interstate commerce and hence have spill over effects. It was also pointed out that it is practically difficult to legislate as the federal and state law-makers could not sit together to make laws. As a result, it was recommended that both legislation and collection of these taxes be assigned to the federal government but the allocation of the revenue would remain within the responsibility of the HoF as per Article 62(7). However, the second reason seems less convincing because there are many ways of regulating concurrent powers of taxation. Both levels of law-makers need not necessarily sit together to regulate concurrent powers. As federal experience elsewhere indicates, it is still possible that the federal government can legislate solely or simply lay down framework legislation leaving some specific details to be filled in by the states. See for more on this Chapter 6.

be decided by a two-thirds majority vote in a joint session of both federal houses.⁸⁴ In other words, residual power of taxation remains with the federal government. It seems, therefore, that as far as the law is concerned the Constitution emphasizes the federal principle. Indeed, it expressly declares ‘The federal government and the states shall respectively bear all financial expenditures necessary to carry out all responsibilities and functions assigned to them by law.’⁸⁵

It should also be born in mind that the Ethiopian Federal system adheres to ‘dualism,’⁸⁶ somewhat strictly. Each level of government has its own legislative, executive, financial and judicial powers.

While this is generally the legal framework, in reality there appears to be some deviation from constitutional principles. Indeed, the trend in many federal systems, including Ethiopia can be described by what John Kincaid rightly calls ‘revenue concentration and expenditure decentralization.’⁸⁷ In almost all federal systems, because the federal government is assigned the task of redistribution as well as securing some level of economic stability, the most lucrative revenue sources have for the most part been kept under federal jurisdiction. On the expenditure side, however, education, health and other social services, relatively high cost activities are often left within the domain of the states. Differences in the state’s economic development and natural resource endowment also contribute to a wide financial capacity among the states. Besides, state governments often are responsible for the administration of federal laws in which case the expenditure responsibility of the states increases. As a result, comparative studies indicate that in most of the federal systems the states are not able to cover the whole of their expenditure responsibilities and some form of fiscal transfer from the federal government is inevitable.⁸⁸

⁸⁴ Article 99.

⁸⁵ Article 94.

⁸⁶ For more on this see Chapter 5 on division of powers.

⁸⁷ John Kincaid (n 78): 328.

⁸⁸ See Ronald Watts, *Comparing Federal Systems* (n 10): 43–53.

For these and other reasons the regime of fiscal arrangement is often lopsided to the federal government and federations have resorted to various kinds of measures to settle the vertical imbalance. However, different kinds of fiscal transfers from the center to the states (at times it also included horizontal equalization between the states) are not often without problems. The states dependency on the federal government affects the constitutional autonomy of the states. Financial resources affect and limit the capacity of the government to perform its assigned legislative and executive responsibilities. Whatever responsibilities are assigned to the states unless they are matched by resources that will enable them to exercise it, the autonomy becomes less effective. However, one has to note the wide variety of the nature of the fiscal transfers. In some federations, the fiscal transfers are followed by stringent conditions in which case their impact on the autonomy of the states will be severe⁸⁹ while in others the states might receive the fiscal transfers and dispose the funds according to their own priorities, in which case its impact on state autonomy could be less.

The Federal Block Grant (general purpose grant) is the single most important source of financing of regional expenditures. It is a formula-based grant. The formula for the allocation of fiscal transfers has varied from time to time. In the first two decades, population size, level of development, and revenue generating capacity were the three variables. However, over the years, population size has taken center stage. The weight attached to population size was increased to 65% in the 2002–2003 fiscal year. Three highly populated states—Oromia, Amhara and SNNPRS—were instrumental in this shift. In the 2004–2005 fiscal year the same regions insisted on a further increase of the weight attached to population and the other states were outvoted. With the change of government in 2018 and subsequent developments, population size has become the main variable in the allocation of subsidy to regional states.

⁸⁹ John Kincaid argues that the United States system of grants in aid that flourished after WWII often contained strict conditions. The number of federal grant programs increased from 132 in 1960 to 593 in 1993 and Congress makes sure that state and local officials spend federal funds for specific purposes. *Supra* (n 78): 328.

<i>Year</i>	<i>Total national government revenue</i>		<i>Total national government expenditure</i>		<i>States own revenue as percentage of their expenditure</i>	
	<i>states share</i>	<i>Federal share</i>	<i>States share</i>	<i>Federal share</i>	<i>Including Addis Ababa</i>	<i>Excluding Addis Ababa</i>
2012/13	18.14	81.86	42.70	57.3	20.70	36.90
2013/14	20.34	79.66	44.66	55.34	21.68	39.78
2014/15	22.47	77.53	43.73	56.27	22.57	39.77
2015/16	22.1	77.9	43.12	56.88	24.48	42.85
2016/17	21.95	78.05	45.99	54.01	29.64	52.21
Average	21.00	79.00	44.04	55.96	23.81	42.30

The new formula below largely based on population size (2017–2022)

<i>Region</i>	<i>Percentage regional state share</i>	<i>Remark (2022/23) 2015 budget law regional share</i>
Tigray	6.03	5.94 (not released for three years because of the war and thus misleading)
Afar	3.02	2.973
Amhara	21.6	21.262
Oromia	34.46	33.92
Somali	9.98	9.824
BG	1.83	1.8013
SNNPR	20.11	12.70
Gambela	1.33	1.3092
Harari	0.76	0.75
Dire Dawa	0.88	0.867
Sidama	–	4.0381
South-west Ethiopia	–	3.0567
Addis Ababa	–	1.566

A survey over the years indicates that the federal government collects more than 80% of all revenue while the regional governments generate the balance which covers only 28.5% of their total expenditure from their own revenue source.⁹⁰ As a result, many have argued that the autonomy of the states is heavily eroded because of their financial dependency on the federal government.⁹¹ While there may be several other reasons for concluding that the federal system is more centralized in practice than it appears in text,⁹² this evidence alone does not seem to warrant such an assertion because unlike many federations the fiscal transfers in Ethiopia for the most part have been unconditional.⁹³

Besides the federal government used to run the mega development projects (roads, hospitals, universities, airports etc.) and that way it was trying to narrow down regional state imbalances. Following the political developments in 2018 however, federal government has resorted not only to centralization of power and resources but the basis for the

⁹⁰ The survey also seems to indicate that Gambela, Benishangul-Gumuz, Afar and Harar are basically dependent for almost all of their expenditure responsibility from the fiscal transfer made from the center. They were able to cover less than 10% of their expenditure from their own revenue. Almost all of these regions are considered 'less developed' and lack by comparative standards the capacity to raise taxes. Infrastructure is poor and they also lack skilled manpower. For more on the regime of fiscal transfers in Ethiopia see Solomon Nigussie, *The System of Revenue Transfer in the Implementation of Fiscal Federalism in Ethiopia*, a paper presented at the 15th International Conference of Ethiopian Studies in July 2003, Hamburg, Germany; comparative study hints the following data on central government tax share and expenditure as part of total tax receipts and public expenditure. Switzerland tax share: 41%, expenditure 30; Germany 51:39; United States 57:54. Source Wolf Linder 2nd edn (n 78): 43.

⁹¹ See for example Edmond Keller, 'Ethnic Federalism, Fiscal Reform, Development and Democracy in Ethiopia,' *African Journal of Political Science* 7:1 (2002): 21–47; Derese Degefa, *Fiscal Decentralization in Africa: A Review of Ethiopia's Experience*, a paper submitted on an ad-hoc expert meeting October 7–9, 2003 on Fiscal Policy and Growth in Africa: Fiscal Federalism, Decentralization and the Incidence of Taxation available at http://www.uneca.org/eca_resources/Meetings_Events/SPD/fiscal/Papers/degefa.htm as visited July on 16, 2004.

⁹² See Chapters 4 and 5 for other reasons for centralization.

⁹³ Ronald Watts argues that substantial portions of federal transfers in parliamentary federations are unconditional and this is perhaps attributable to the fact that the legislature is able to control the cabinet as the latter is part of the legislature. This contrasts with the United States where Congress attaches specific conditions to 80% of the fiscal transfers hence leading to tight expenditure accountability. Ronald Watts, *Executive Federalism: A Comparative Analysis* (Ontario: Queen's University, Institute of Intergovernmental Relations, 1989): 13–14.

allocation of the subsidy has largely been decided based on population size pushing other variables aside. The federal government also seems to have abandoned engaging itself in development projects that could narrow down regional state imbalances as the war is consuming the countries meagre resources. In the 2022/2023 annual year, the budget of Addis Ababa (federal capital) is 140 billion birr which is *seven times* the regional states with comparable population size that gets 20 billion birr. Again, this is another major paradox in the Ethiopian system. Although the HoF is constitutionally mandated to promote solidarity and unity among the nationalities, the principles for the allocation of the subsidy have rewarded more populous regional states side-lining the less populous ones. According to the federal Constitution, 'It [HoF] shall determine the division of revenues derived from joint federal and state tax sources and the subsidies that the federal government may provide to the states.'⁹⁴ It is important to note that the role of the HoF is double: it is the HoF that determines the criteria for the allocation of concurrent tax (Article 98) as well as on the subsidies that the states receive from the federal government.⁹⁵ While this role of the House is crucial in light of the states' dependency on fiscal transfers, the fact that its composition is more or less similar with the lower house creates a problem in the decision-making process. In an earlier study, the author pointed out that despite the difference in the size of electoral districts, the net outcome of both houses, despite the widely held view that the HoF is the house for nationalities, is

⁹⁴ Article 62(7).

⁹⁵ The formula for the allocation of fiscal transfers has varied from time to time. At earlier stages, population size (33.3%), level of development, and revenue generating capacity were the basis. Between 1997 and 1999, the variables remained the same but the weight attached to them increased to 60, 25 and 15% respectively. In 2000/2001 one additional variable is added and the corresponding weight also adjusted. Population weight carried 55%, level of poverty 10%, expenditure demand 20%, revenue raising capacity and execution efficiency 15%. While the other criteria remain less controversial, the weight attached to population size was increased to 65% in the year 2002/2003 fiscal year. Three highly populated states, Oromia, Amhara and SNNPRS, were instrumental in this shift. In the 2004/2005 fiscal year the same regions insisted on a further increase of the weight attached to population and the other states were outvoted. In the meantime the issue was far from settled; it was suspended for a while and in the end decided according to the criteria of the previous year. Interview, Samuel Alemayehu, Secretariat of the HoF, January 24, 2005.

majoritarian in much the same way as the lower house.⁹⁶ Now the relatively populated states are pushing the House to increase the weight of population size (and it has increased over the years from 30% to 65% and since the new regime assumed power in 2018 to hundred percent) in the allocation of shared revenues and grants. The latest formula takes into account population size, revenue generating capacity, expenditure needs and level of development. While the indicators largely remained the same, the percentage weight they carry has varied across time. For example, during the early phase of federalism and decentralization, population size of regional states had 65% weight. In the newly approved formula decided in the 2019/2020 term of the HoF, the percentage attached to population size has increased significantly so much so that regional states such as Harari, Gambela and Benishangul Gumuz with smaller population size literally rejected the new proposal arguing that it is biased towards more populous states. The less populated states are consistently becoming the losers and it seems it is hardly possible to reverse this trend. As a result, while the HoF might have been envisaged as the most legitimate political body to decide on fiscal transfers, it is becoming less relevant to the less populated states. It is for this reason that one might be tempted to conclude, as far as the less populated nationalities are concerned that the federal principle is betrayed seriously.⁹⁷ In this crucial issue, for instance, the much-politicized issue of the right of nationalities has not been translated into political realities. The much-emphasized notion of ‘sovereignty of nationalities’ is nowhere to be found.

This could also have implications for the role that fiscal transfers could play in creating some degree of level playing field both vertically and horizontally. As already noted, some federations like Switzerland and Germany have clear policies of adhering to maintaining equality of standards across the federation while in the United States, it is more competitive. The Ethiopian federal system is evolving in favour of more populous states. At early stages, the fiscal transfers aimed at enhancing ‘war torn’ areas and also seemed to adhere to federal solidarity rather than competition among the states. Recent developments, however, seem

⁹⁶ See Assefa Fiseha (n 77).

⁹⁷ Many think wrongly that the HoF is the defender of the right of nationalities. As a compromise the HoF decided to deduct 1.5% from the share of bigger regional states-Oromia, Amhara and the South and redistribute it to the smaller ones. See the New HoF subsidy allocation formula, available with the author.

to suggest that the idea of federal solidarity is becoming less and less relevant. This might then lead to tension with the idea that the federal system was established with a view to ameliorating ethnic tensions among the different nationalities. Interestingly it is important to note that it is the HoF that is entrusted with the responsibility to ‘promote the equality of the peoples of Ethiopia ... and consolidate their unity ...’⁹⁸ These very principles are now abandoned in favour of population size.

Other powers of the HoF include: deciding issues related to self-determination of nations, nationalities and peoples, promoting the equality of the peoples; deciding disputes or misunderstandings that may arise among states; exercising concurrent powers together with the HoPR and this includes: the residue power on tax, election of the federal president, and constitutional amendment under Articles 104 and 105; determining the division of revenues derived from joint federal and state tax sources and the subsidies that the federal government may provide to the states; determining civil matters which require the enactment of laws by the HoPR; ordering the federal government to intervene if any state threatens the constitutional order in violation of the constitution.⁹⁹ The main function of the House appears to be an institution for conflict resolution and adjudication of constitutional issues rather than a law-making organ. As indicated in the first section of this chapter, federal law-making power is exclusively entrusted to the House of Peoples’ Representatives in Ethiopia. This conclusion is not only clear from the specific powers of the HoF as outlined in the Constitution but is also well recorded in the minutes of the Constitutional Assembly.¹⁰⁰

⁹⁸ Article 62(4). Article 89 (2) states that ‘Government has the duty to ensure that all Ethiopians get equal opportunity to improve their economic conditions and to promote equitable distribution of wealth among them’ and sub 4 of Article 89 also states ‘Government shall provide special assistance to Nations, Nationalities, and Peoples least advantaged in economic and social development.’

⁹⁹ Ethiopian Constitution Article 62.

¹⁰⁰ See *Ye Ethiopia Hige Mengist kale Gubae v. 4 and 5* (Addis Ababa: Hidar 14–20, 1987) *Amharic*. Minutes of the Constitutional Assembly November 25–December 1 (1994 Unpublished).

3.6 CONCLUSION

What can be stated as a general conclusion from the survey of the institutions in the light of the normative requirement that federalism incorporates unity and diversity is that it is the second chamber, though not exclusively, which is expected to reflect normative diversity as we tried to indicate. The two most powerful second chambers, of the United States and Switzerland, seem to reflect another dimension of the interests of the electorate rather than the interests of the states. The Indian second chamber is certainly less powerful compared to the lower house. There is more to learn from the German *Bundesrat* if the federal idea of maintaining diversity at the center is to be something other than mere rhetoric. First, second chambers ought to be empowered to exercise some veto powers regarding key issues that affect the interest of the states. It does not matter whether the states represent diversity as in Switzerland or other interests as in Germany as the interests might differ from one federation to another. In Ethiopia, it appears that the states have no mechanism for checking the laws enacted at federal level, for not violating state autonomy as proclaimed by the federal Constitution. There is an important element missing in the Ethiopian situation. Thus, it is demonstrated that the federal system in Ethiopia lacks sufficient institutional avenues for guaranteeing shared functions to the units as policy-making is not shared between the two levels of governments. Beyond that states should also be able to defend other regional interests, which they might deem vital, against the center. Hence, not only should the HoF be a legislative house, it should also have some veto powers over matters deemed important by the states. The revisionary function of all second chambers is also vital as it brings a second thought to the bills adopted by the other house. Yet the South African second chamber does hint that even with proper designs, hegemonic party may reign over sub state interests and thus frustrate the goal of second chambers in promoting sub state interests. Ethiopia is an extreme case that reflects double paradoxes. It claims to empower ethno national groups and to ensure their representation in federal institutions but the formula of representation and the basis for the allocation of subsidy show in both counties, nationalities are the losers.



Federalism, Devolution and Cleavages in Africa: Do Institutions Matter?

4.1 INTRODUCTION: THE NATURE OF CLEAVAGES AND INSTITUTIONAL DESIGN

Whether it is possible to ensure democracy, stability, peace and social cohesion in countries with deep societal divisions and the appropriate institutional arrangements is one of the central political issues of our time.¹ This is particularly so in many diverse countries in Africa where nation-building is linked with coercive and arbitrary processes by which the same communities are subdivided into different countries by artificial colonial borders.²

In some African countries with deep cleavages, the state continues to suffer from structural problems where the central government is often accused of centralisation of power under an imperial center (big man, hegemonic party), weak institutions, corruption, abuse of rights and

¹ Alfred Stepan, Juan Linz and Yogendra Yadav, *Crafting State Nations: India and Other Multinational Democracies* (Baltimore: Johns Hopkins Press, 2011); Sujit Choudhry, 'Bridging Comparative Constitutional Law: Constitutional Design in Divided Societies' in Sujit Choudhry ed., *Constitutional Design in Divided Societies* (Oxford: Oxford University Press, 2008): 4.

² For the limitations of the nation state, see Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford University Press, 2007): 61–63.

marginalization of the bulk of society. Thus, claims for accommodation, ethnic conflicts, violence, civil war, threats of secession and state fragmentation remain major challenges. Some post-colonial African countries attempted to address these challenges by resorting to some form of federation and autonomy but with the exception of Nigeria, all such efforts collapsed within a decade of their establishment.³ The failure of the federal experience resulted in centralized unitary governments, imperial presidents and one party rule.⁴ The respective federations failed because they were confronted by strong one-man leadership who thought federalism would lead to state fragmentation and was thus against their own vision of centralized nation building.⁵ The political leaders of such a diverse continent thought federalism in the context of artificially drawn borders might lead to polarization and may in the end put unity and territorial integrity at stake.⁶

After the end of the Cold War, however, there was resurgence in the use of federalism and devolution in Africa. For some it became a means to 'domesticate the Leviathan'⁷ by transferring power from the all-powerful center to subunits diffusing power into many centers. In others, federalism and devolution go beyond diffusing power and aim to manage territorially based and politically mobilized cleavages. Four main African countries (Nigeria, Ethiopia, South Africa and Kenya) have used federalism and devolution to achieve either or both of the above objectives.

This chapter discusses the different institutional approaches adopted in four federations and examines whether institutional design matters while addressing demands from politically mobilized groups. Should such cleavages be considered as building blocks for political engagement and

³ Thomas Franck, 'Why Federations Fail?' in Thomas Franck ed., *Why Federations Fail: An Inquiry into the Requisites for Successful Federalism* (New York: New York University Press, 1968): 167–200.

⁴ Ursula Hicks, *Federalism: Failure and Success, a Comparative Study* (London: The Macmillan Press, 1978): 4.

⁵ Daniel Elazar, *Exploring Federalism* (Tuscaloosa: University of Alabama Press, 1987): 240–244; Hicks, (n 4): 171–196.

⁶ Goran Hyden, 'Electoral Systems and Political Reform,' in *Constitutionalism: Reflections and Recommendations, Proceedings of the Symposium on the Making of the New Ethiopian Constitution* (Addis Ababa: Inter Africa Group, 1993): 9.

⁷ Nico Steytler, 'Domesticate the Leviathan: Constitutionalism and Federalism in Africa.' *African Journal of International and Comparative Law* 24:2 (2016): 272.

institutions built around them or should they be diffused and deliberately divided into several subunits? What factors determine and explain the choice of institutional design? A key entry point is understanding the nature of the cleavage that has continued to challenge the nation-state and occupied political and expert attention on a new form of accommodation. States have responded quite differently to demands by mobilized ethno national groups.⁸ The chapter presents three of the well-known approaches: integration, power sharing and federal accommodation. Behind the three options however is the nature of the cleavage and how to manage it. A short explanation about the nature of the cleavage is thus in order as it impacts institutional design.

The chapter has four sections. Section 4.1 provides the introduction and brief account of the nature of the cleavage and how it affects institutional design. Section 4.2 discusses the three federations in brief. Section 4.3 explains the integration and accommodation features as included in the respective constitutions. Section 4.4 provides some comparative conclusions.

4.2 TERRITORIALLY BASED CLEAVAGES

We noted already on the nature and cause of politically mobilized cleavages and how they continue to threaten the nation state in chapter one. Such cleavages caused what Arend Lijphart dubs a ‘wave of ethnic conflicts,’⁹ instead of the promised ‘third wave of democracy.’¹⁰ They are often regionally concentrated ethno national or regional groups who once enjoyed or aim to enjoy political autonomy and claim their political ambitions have been frustrated as a result of the coercive process of nation

⁸ Richard Simeon, *Managing Conflicts of Diversity, in* Building on and Accommodating Diversities (Ronald Watts & Rupak Chattopadhyay eds., New Delhi: Viva Books, 2008): 54–62.

⁹ Arend Lijphart, ‘The Wave of Power Sharing Democracy,’ in Andrew Reynolds ed., *The Architecture of Democracy: Constitutional Design, Conflict Management and Democracy* (New York: Oxford University Press, 2002): 37.

¹⁰ Samuel Huntington, *The Third Wave: Democratization in the Late 20th Century* (University of Oklahoma Press, 1991).

building.¹¹ They mobilize politically around assertions of national identity and self-determination. The goal of such mobilization is to recover the extensive self-government they claim to have enjoyed historically or they aspire to have in the future. The degree of self-government they seek ranges from autonomy, national self-government to independent statehood.

The claims and counter claims between the politically mobilized cleavages and the nation state have effect on the country's territory and its stability. The demands of such groups are framed and entrenched in relation to a particular territory and the very existence of the unity and territorial integrity of the state is put to test.¹² Indeed territory remains key aspect of the political contestation and mobilization. The cleavages aspire for self-government over a defined territory, at times claimed as homeland and even wish it to be territory over which they exercise statehood, if they secede. On the contrary, the state insists on territorial integrity, unity and full control over each territory. Contest over territory is thus an integral part of the political debate.

The failure to address the territorial and political contestations through dialogue and the political process result in conflict and fragmentation. More than a dozen of new states have emerged since the end of the Cold War.¹³ Major western political theories neglected ethno national minority rights as they assumed they will assimilate and wither away.¹⁴ The left focused on class and the proletariat was projected as global having no parochial nationality. Ethno nationalism was a transient problem that will disappear with the establishment of socialism. Some rightly called this trend as 'post national illusion'¹⁵ and suggested the design of appropriate institutions and policies to manage it. Politically mobilized cleavages

¹¹ Ted Robert Gurr, *Minorities at Risk: A Global View of Ethnopolitical Conflict* (Washington: United States Institute of Peace Press, 1993): 18–20.

¹² George Anderson and Sujit Choudhry, 'Territorial Cleavages and Constitutional Transitions: Political Mobilization, Constitution Making Processes and Constitutional Design,' in Anderson and Choudhry eds., *Territory and Power in Constitutional Transitions* (Oxford: Oxford University Press, 2019): 374.

¹³ Alfred Stepan, Juan Linz and Yogendra Yadiv (n 1): 9, 14.

¹⁴ The most seminal work that broke this tradition is Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995).

¹⁵ Ghia Nordia, 'The End of the Postnational Illusion,' *Journal of Democracy* 28:2 (2017).

continue to challenge the process of nation building both in the developed and the developing world. The countries in this study (Nigeria, Ethiopia, South Africa, Sudan and Kenya), despite differences in the degree of mobilization, all continue to face challenges related to group based cleavages.

Distinct feature of the cleavages besides to territorially based political claim for self-government is the political mobilization around identity exceeding that accorded to alternative forms of political mobilization such as ideology, class, and gender, and the relationship between groups is affected by deep levels of mistrust and antagonism, making cooperation difficult.¹⁶ This is not diversity as an anthropological fact as is the case in many countries.¹⁷ It is a context where the differences are politically salient and an identity based distinct group uses it as basis for political mobilization. As such identity becomes the prime source of political mobilization around which political claims for recognition, resource control, accommodation, and self-government are framed, political parties formed, elections contested and governments composed.¹⁸ These forces affect the process of constitution making and constitutional design. A distinct identity based political mobilization demands for a more autonomous self-government while less mobilized groups could be managed through integration and other softer options.¹⁹

As a result of cleavage, the four countries under study continue to face a threat of fragmentation, albeit to varying degrees. Ethiopia lost Eritrea and the threat of secession is still a problem as it harbours many national liberation movements that have survived decades of central government onslaught. Some ten ethno national groups that used to administer themselves at local government level in the South have following the winds of change in 2018 demanded a constituent unit status and some four of them have become new regional states. The war between the federal government and Tigray although has multiple causes is very much related

¹⁶ Donald Horowitz, 'Constitutional Design: Proposals, Process,' in Andrew Reynolds ed., *The Architecture of Democracy: Constitutional Design, Conflict Management and Democracy* (New York: Oxford University Press, 2002).

¹⁷ Choudhry (n 1): 5.

¹⁸ Anderson and Choudhry (n 12): 374.

¹⁹ Ronald Watts, *Comparing Federal Systems*, 3rd edn (Montreal and Kingston, McGill, Queen's University Press, 2008): 84.

to Tigray's age old demand for genuine self-government²⁰ and fair representation in federal institutions. Ethno national and regional groups are thus demanding more, not less even after two and half decades of federal practise.

Nigeria's split between north-south, Muslim-Christian remains visible in particular during presidential elections. The split is kept at delicate balance based on an unwritten convention that guides presidential elections to commonly rotate the office of the president between the north and south.²¹ Nigeria faced secession threat from Biafra towards the end of the 1960s and Igbo nationalism has not withered away. There is also an insurgent group in the Niger Delta (Ijaw) region where most of Nigeria's oil comes from but the region claims it has not benefiting from and is exposed to worst environmental crisis.²² In reaction to extremely centralized federation and suppressed marginalization during the military era, a demand for 'true federalism,' that grants genuine political autonomy and resource control is now fully expressed by different ethno-regional groups (Yoruba, Igbo, Niger Delta region) in Nigeria.²³ Federalism was supposed to be the solution but it has never been implemented to the satisfaction of sub-units. The federal government often resorts to brute force, not dialogue, against insurgents triggering radical reactions.²⁴

South Africa has cleavages based on race, language and class. It faces Zulu nationalism that over the years, seem to be diluted both because of lack of internal cohesion and as a result of the African National Congress's (ANC's) penetration in its social base through a democratic process. Kenya has its North East Frontier Somali claim and the rift valley region where ethnic conflicts have erupted on several occasions, in addition to the Indian Ocean coastal region where there is strong demand

²⁰ See Assefa Fiseha, 'Á Nation in Search of Statehood,' *International Journal of Minority and Group Rights* (2023).

²¹ Peter Lewis and Darren Kew, 'Nigeria's Hopeful Election,' *Journal of Democracy* 26:3 (2015).

²² Dele Babalola and Hakeem Onapajo, 'New Clamor for Restructuring in Nigeria: Elite Politics, Contradiction and Good Governance,' *African Studies Quarterly* 18:4 (2019): 45.

²³ D. Babalola, 'Nigeria: A Federation in Search of Federalism,' *50 Shades of Federalism* (2017).

²⁴ John Campbell and Nolan Quinn, 'What is Behind Growing Separatism in Nigeria?' *Council on Foreign Relations*, available at <https://www.cfr.org/article/whats-behind-growing-separatism-nigeria>, accessed February 24, 2023.

for self-rule. Ethnic rivalry for controlling the overbearing presidency in a winner-take-all politics resulted in ethnic conflicts in 2007 and subsequent elections and continues to divide Kenyans along ethnic lines.

It is vital to note that mobilization around identity is result of and reaction to structural problem in a state. There is no implication that each diversity turns to political mobilization. Political and economic injustice that is reinforced by deep cleavages, elites that frame the issues, and state response or the lack thereof play their own roles in the process of transformation. The mobilization process needs agency- political entrepreneurs that read into the political dynamics of the country and frame the issues in a way that appeals to their audience. These political entrepreneurs are critical in ‘framing of narratives,’²⁵ articulating perceived or real exclusion and subjugation. Anderson and Choudhry argue ‘political entrepreneurs are critical to the success of political mobilization by framing the case (of ethno nationalism), developing strategies, and marshalling resources.’²⁶ They articulate alternative narratives that seek to deconstruct any centrist narrative about the past, present and the future (fears and possible hopes) addressing the grievances and the entitlements of the population they claim to represent including territorial entitlements. Through that an ideology is framed and a plan set for concrete action.

Second, Gurr argues that conflict between competing nationalisms typically escalates in stages and it is here that one finds the link with state policy. Eritrea’s secessionist elite demand in the mid-1980s was limited to restoration of the federation (1952–1962) that was unilaterally abolished by Emperor Haile Selassie in 1962. With the military regime’s failure to respond, radical issues such as secession emerged. Thus, cleavages often start with non-violent modest demands and, when regimes fail to respond, evolve into violent protest and finally to rebellion. This escalation occurs through a pattern of demands and responses: non-violent protest is met with a lack of political responsiveness, which in turn leads to violent protest, which is met with a violent reaction, and which then leads to rebellion and an armed conflict and civil war. State policy and action or inaction is thus a major factor that can escalate or moderate ethno-nationalism.

²⁵ Anderson and Choudhry (n 12): 383.

²⁶ Ibid.: 382.

Third, the process of mobilization and transformation to a political project is heavily associated with the nation building project pursued by the central government including the forceful annexation of previously semi-autonomous territories, the imposition of common national identity including language, centralization of power and resources. *Left outs* from the process design a defensive response to central state led project of nation building.²⁷ In other words, ethno-national based cleavage and political mobilization is often a reaction to centrist elite's project and a search for finding a political and identity space.²⁸ It is a sub state nationalism framed in reaction to the central government's nationalism. There are thus competing nationalisms within the nation state that if not addressed could lead to violence, civil war and state fragmentation. Both are pursued in the name of nationalism and have the potential to fuel the passions and emotions from both sides of the political spectrum to cause political instability and state collapse. This one may call is a clash of nationalisms, one pursued by the central government in the name of nation building, patriotism, civic nationalism, unity, ensuring territorial integrity and the other by the ethno-nationalist elite. The civil war in Ethiopia (1974–1991) fits well into this framework. The centrist military regime fought the ethno-national based liberation fronts in the name of *Ethiopia Tikdem* (Ethiopia First) and ensuring the territorial integrity of the country while branding them as secessionists. The ethno-nationalist elite frames the centralized nation state as a mask for the centrist elite's culture, language, religion to become the national culture, language or religion.²⁹ In other words, the group, however narrow its base, which controls the state uses it not only to marginalize others from power and resources but also uses state institutions and policies to 'promote, consolidate and create a privileged position with respect to its identity and its manifestations. The state is defined as the expression of the group's nationhood.'³⁰ The non-material aspects of conflict such as the search for

²⁷ Ibid.: 381.

²⁸ Lars-Erik Cederman, Andreas Wimmer and Brian Min, 'Why do Ethnic Groups Rebel? New Data and Analysis,' *World Politics* 62:1 (2010): 87.

²⁹ Kymlicka (n 2): 61–63.

³⁰ Ibid.: 62.

dignity and collective self-esteem,³¹ rich history ('we were great and we want to be great again'), and claims by ethno-nationalist groups to regain lost social status (dignity) in response to historical traumas on their identity, fear of extinction, ethnic cleansing and genocide fuel the political and resource conflict.³² As Connor pointed, cleavages do not allow themselves to be killed for their interests but they allow themselves to be killed for their passions.³³ The conflict thus becomes so protracted and destructive and it is here where innovative conflict resolution institutions remain very relevant.

We already noted in chapter one as well that many of the countries under discussion are not democratic but even if they were to be one, majoritarian based democracy in deeply divided societies could generate problems, necessitating the need for other inclusive options. This is an area where institutional design matters a lot. This is particularly acute if the drivers of the central government version of nationalism are not a majority. In many cases, as in the countries covered as case studies, there is no dominant ethno national group that enjoys a demographic majority and could claim to have democratic majority to pursue its goals. It becomes a clash between a minority that has state resources at its disposal to try to impose its will on other minorities.³⁴ Thus, alternative theories such as consociational democracy have been recommended when the political system faces deeply divided cleavages. Instead of having winners and losers, consociational democracy brings major political actors either on equal or through proportional arrangements to power and insists on consensus decision making on fundamental issues. Thus left-outs in the majoritarian democracy become decision makers through power sharing, reducing the potential for conflict. Distinct institutional arrangements thus matter in managing cleavages and reducing conflicts.

Given the complicated nature of the territorial cleavage, the level of political mobilization, the nature of the elite that frames the issues

³¹ Walker Connor, *Ethno Nationalism: The Quest for Understanding* (Princeton NJ, 1994).

³² Francis Fukuyama, *Identity: the Demand for Dignity and the Politics of Resentment* (Farrar, Straus and Giroux, 2018); Kymlicka (n 2): 81; Horowitz, *Ethnic Groups in Conflict* ((Berkeley: University of California Press, 1985): 131–4.

³³ Connor (n 31): 206.

³⁴ Arend Lijphart, 'Constitutional Design for Divided Societies,' *Journal of Democracy* 15:2 (2004): 98.

and state response (accommodative, integrative or repressive), schools of thought vary on whether the 'cleavage and difference be recognized, emphasized, institutionalized and empowered or should it be diffused, blurred, transcended'³⁵ and disempowered. Yet, although little explored in the comparative literature in Africa, at least from the institutional design perspective, there seem to be implicitly two options. The first, usually called the integrationist or centripetal system, is associated with Donald Horowitz with its ideological roots in the USA, and is reflected in the constitutions of Nigeria, South Africa and Kenya. The second is largely a European and has partly leftist origins, and is known by different names as pluri-national, multinational or ethno national based federations with its core feature of accommodation policy towards territorially based politically mobilized cleavages.

Although, owing to the centralized nature of African federations, there is little divergence in reality, the design differences are visible and manifest important differences that may be of interest to comparative federalism. The next sections analyse the key features of the federal and devolved systems in the respective constitutions and explain the underlying differences. It is argued, the level of identity-based mobilization and nature of the cleavage that demands accommodation and the vision and nature of the political elite during the constitutional moment are among others key factors that affect institutional design options. In terms of outcome however, except in South Africa, all the federal and devolved systems regardless of institutional design differences have not contained strongly mobilized territorially based cleavage.

³⁵ Christina Murray and Richard Simeon, 'Recognition without Empowerment: Minorities in a Democratic South Africa,' in Sujit Choudhry ed., *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford: Oxford University Press, 2008): 411.

4.3 FEDERAL AND DEVOLVED SYSTEMS

4.3.1 *Nigeria*

Nigeria, the most populous country in Africa, gained independence from British colonial rule in 1960³⁶ and soon became a federal parliamentary republic (1960–1966).³⁷ Since then Nigeria remains the only federal country in the West African Region. Nigerian diversity is mainly reflected in terms of the large number of ethno-linguistic groups, six geo-political zones (three in the North and another three in the South) reflecting major ethno national configuration that challenge the military designed small size thirty six states³⁸ and the North–South territorial divide. It has two major religions: Islam and Christianity, with the former practiced predominantly in the north, and the latter in the southern part of the country.³⁹

From independence to the first military coup of January 1966, the evolving political system was characterized by a weak federal center and three strong regional governments.⁴⁰ The three regions were: the north (Hausa Fulani), western (Yoruba) and eastern (Igbo), each with a dominant ethnic group effectively controlling political power but each region at the same time consisting of a number of minority ethnic groups.⁴¹ Leaders of the regional parties chose to head their respective regional

³⁶ See Assisi Asobie, ‘Centralizing Trends in Nigerian Federalism,’ in Isawa Elaigwu and R.A. Akindele eds., *Foundation of Nigerian Federalism: 1960–1995* (Abuja: National Council on Intergovernmental Relations, 1996): 131.

³⁷ See Festus Nze, ‘Nigeria,’ in Ann Griffiths ed., *Handbook of Federal Countries 2002* (Montreal and Kingston: McGill-Queen’s University Press, 2002): 222–225.

³⁸ See Rotimi Suberu, ‘Constitutional Infidelity and Federalism in Nigeria,’ in Charles Fombad and Nico Steytler eds., *Decentralization and Constitutionalism in Africa* (Oxford: Oxford University Press, 2019): 124.

³⁹ C. Agbodike, ‘Federal Character, Principle and National Integration,’ in Kunle Amuwo et al. eds., *Federalism and Political Restructuring in Nigeria* (Ibadan: Spectrum Books Ltd. And IFRA, 1998): 177.

⁴⁰ Isawa, Elaigwu, ‘Federalism and National Leadership in Nigeria,’ *Publius: The Journal of Federalism* 21:4 (Fall 1991): 129.

⁴¹ Attahiru Jega, ‘The Nigerian Federal System: Problems and Prospects,’ in Lidija Basta and Jibrin Ibrahim eds., *Federalism and Decentralization in Africa: The Multicultural Challenge* (Fribourg: Institute of Federalism, 1999): 195, 201–202.

governments and send deputies to the federal government.⁴² While some characterise this era as ‘ethnic federalism,’ that led to weak center and civil war others argue, this was the era of ‘truly decentralized federalism in Nigeria.’⁴³

A major feature of the federation that was inherited from the colonial administration was the structural imbalance between the north and the south.⁴⁴ The Northern region was in a position to hold the whole country hostage as it commanded seventy-nine percent of the country’s total area and 53.5% of the population according to the 1963 census. It was not surprising then that in the southern part there was always the fear of northern domination (a tyranny of the majority). It was virtually impossible for the south to control political power at the center.

It was in this context that the military coup of January 1966 sought to tilt the delicate balance between the regions, leading to concentration of both political and economic power in the hands of the southern leaders.⁴⁵ The northern civil servants felt threatened as they lost the political power to the South who were relatively well trained and educated. To restore political control, the North reacted violently which led to the coup of July 1966. The July coup led by junior Northern military officers brought colonel Yakubu Gowon to power, thereby ‘restoring’ the balance of power. Gowon also restored the federal system that was abolished by Ironsi (one of the leaders of the January Coup who suspended the federal system). The federation was put to the test following the July coup as the Igbos who were harshly treated throughout the country, threatened to

⁴² This era is considered as the golden age of the regions. The regional political leaders, for example Chief Awolowo was Premier of the West, Dr. Nnamdi Azikiwe was Premier of the Eastern region and Sir Ahmadu Bello remained Premier of the North. See J.A. Ayoade, ‘The Changing Structure of Nigerian Federalism,’ in Isawa Elaigwu and A. Akindele eds., *Foundation of Nigerian Federalism: 1960–1995* (Abuja: National Council on Intergovernmental Relations 1996): 52; Lincoln Joshua, *The Effects of Federalism on Inter group Relations in Multi-ethnic States: Evidence from Nigeria and Ethiopia 1960–1998* (UMI Dissertation, 2000): 82.

⁴³ Ladipo Adamolekun, ‘The Nigerian Federation at Crossroads: the Way Forward,’ *Publius: The Journal of Federalism* 35:3 (2005): 383.

⁴⁴ Isawa Elaigwu, ‘Federalism in Nigeria’s New Democratic Polity,’ *Publius: Journal of Federalism* 32:2 (Spring 2002): 73–96.

⁴⁵ The military coup was led by a major Chukwuma Nzeogwu, an Igbo from the East. Those who organized the coup failed to succeed and eventually Major General Aguiyi-Ironsi, officer in the Nigerian army, Igbo, took control of the government. He abolished the federal system and opted for a unitary system.

secede creating their own state of Biafra and only surrendered following two and half years of brutal civil war on January 12, 1970. Since then all leaders have committed themselves to maintaining Nigeria as a federation, although it had difficulties in practice owing to the dominant role of the military.⁴⁶ The failed Biafra secession had a lasting impact in Nigeria. The political elite at the center has since then been trying to prevent a resurgence of constituent unit based nationalism by breaking down the major groups into many smaller states.

Except for the brief periods of 1960–1966 and 1979–1983, Nigeria remained under military (in total twenty-eight years) until the restoration of civilian rule under an elected president in 1999. During this long period of military rule, the constitution has been suspended, constituent unit power transferred to the national government, and redrafted several times by successive regimes. The military ruled by decree, eroding the independence of the judiciary and trampling on the rule of law in a profoundly authoritarian way.⁴⁷ The military head of state and commander in chief appointed and removed the military governors/administrators of the states. These appointees were answerable to their military heads, not to the people.⁴⁸ The federal government repeatedly exercised emergency powers to legislate for any part of the federation on any subject, which it deemed necessary and took executive action in areas outside the exclusive and concurrent lists of national powers.⁴⁹ The generals designed what Suberu calls ‘hyper-centralized federalism’ as they expanded the mandate of the federal government at the cost of the states, abandoned parliamentary system and shifted to a powerful president, centralized resources and broke down the four states into thirty six smaller states.⁵⁰ As the military was dominated by the North for long that also meant the North has dominated Nigeria.⁵¹ Of the ten Nigerian heads of state before 1999, seven were from the North and only three from the

⁴⁶ Martin Dent, ‘Ethnicity and Territorial Politics in Nigeria,’ in Graham Smith ed., *Federalism: The Multi-ethnic Challenge* (London: Longman, 1995): 132.

⁴⁷ Jega (n 41): 202.

⁴⁸ Elaigwu (n 44).

⁴⁹ Dent (n 46): 147.

⁵⁰ Suberu (n 38): 107.

⁵¹ Ambrose Ihekwoaba Egwin, *The Dynamics of Federalism in Nigeria* (Cham: Palgrave Macmillan, 2020): 86.

South. Despite the constitution requiring the fair representation of all Nigerians in public institutions (federal character principle), to prevent dominance by particular groups, narrative of marginalization is thus not uncommon. The extreme centralization of national power and the narrative related to northern dominance has been a driver for the resurgence of ethno-nationalism and cleavages have not withered away. Demands for ‘true federalism’ (transfer of power from the federal government to states), reduce the number of states from 36 to possibly six geo-political zones or the few states of the early 1960s, devolution of resources to the states, role of Sharia in the northern states and restructuring the federation continue to divide Nigerians.⁵² Some even went to the extent of suggesting the introduction of power sharing arrangements and proportional electoral systems with a view to lower down the high stakes of power associated with the presidential system.⁵³

The Nigerian federation, typical of Donald Horowitz’s centripetal federation, claims to have constituted itself on a territorial basis.⁵⁴ The system is in principle not designed to empower ethno-linguistic groups by granting their own states. The federation also aims to create many small-sized states of comparable population and to guarantee fair shares for the states in the allocation of jobs and benefits through the principle of ‘federal character’.⁵⁵ Federal character refers to the fair allocation of posts between ethnic and regional groups in public institutions at different levels. The principle was introduced in reaction to the fear that conflicts result because of fear of one ethnic group dominating the federal government and occupying an unfair share of government posts.

The 1999 Constitution (Article 2) declares Nigeria is a federation consisting of thirty-six states. The Constitution, a very comprehensive document containing provisions not only about the organs of the federal

⁵² Egodi Uchendu and Emmanuel Eyeh, ‘Nigeria since 2014: Restructuring or Dismemberment?’ in Samuel Oloruntoba ed., *The Political Economy of Colonialism and Nation Building in Nigeria* (Cham: Palgrave Macmillan, 2022): 133–135.

⁵³ Rotimi Suberu, ‘Nigeria in Search of A Credible Electoral Administration: Recent Reforms and Persistent Challenges,’ in Charles Fombad and Nico Steytler eds., *Democracy Elections and Constitutionalism in Africa* (Oxford: Oxford University Press, 2021): 358.

⁵⁴ Donald Horowitz, *A Democratic South Africa? Constitutional Engineering in a Divided Society* (University of California Press, 1992).

⁵⁵ Jega (n 41): 128; federal character refers to fair allocation of posts and resources among the several ethnic groups but has limited relevance in practice. Many Nigerians resent the North’s dominance.

government but also about the states, divides power between the federal government and the states (Article 3). Consistent with prior constitutions, it maintains the presidential system of government (Article 130) and the federal legislative function is vested in the National Assembly, which consists of the Senate (composed of three senators from each state and one from Abuja-the capital) and the House of Representatives (Article 4). Many contend that as a result of the legacy of military rule, the federal exclusive legislative list is extensive.⁵⁶ The Second Schedule to the Constitution in Part I enumerate sixty-eight items as exclusive legislative powers of the federal government.⁵⁷ Part II of the same schedule consists of twelve items under the heading concurrent legislative list of both federal and state governments with federal government overriding in case of conflict between the two authorities (Article 4).

Compared to Ethiopia and to some extent South Africa where dominant parties control federal and sub unit institutions, Nigeria has shown some progress towards democratization. Although contestations against presidential elections and trust against the electoral management body remains controversial, opposition parties have as in Kenya won elections in at least one-third of the states and major political parties (All Progressive Congress—APC and Peoples Democratic Party—PDP) have alternated in power since 2015.⁵⁸ Political parties play crucial role in shaping the dynamics of politics in general and federalism in particular. Yet the Nigerian case remains very complicated. The threat of secession from Biafra and the associated fear of fragmentation, the legacy of military rule, the need to control resources (oil) at the center have visible impact in the system. Although the military rule ended in 1999, retired former army generals continue to play active role in the political parties both in the PDP and APC. Mohammadu Buhari the two term president of Nigeria (2015–2023) from APC was a former army general and one can mention

⁵⁶ Elaigwu (n 44).

⁵⁷ The new federal constitution empowers the National Assembly to make laws for the peace, order and good government of the federation or any matter included in the exclusive legislative list. This list empowers the federal government to legislate on the accounts of the federal government and of the offices, courts and the authorities thereof, aviation, defense, foreign affairs and nuclear energy, bankruptcy, insolvency and banking, bills of exchange, borrowing, census, citizenship and naturalization, currency, coinage and legal tender, mines and minerals, national parks, pass port and visas. It can also legislate on any of the items on the concurrent list. Art. 4 cum Second schedule, part I.

⁵⁸ Suberu (n 38): 109.

several other similar stories. Thus despite return to civilian rule, one does not see fundamental reform to the federal system because key old actors remain active in a new form within the parties and centralization continues. The two main parties according to an expert are dominant and show high degree of centralization.⁵⁹ Yet, the fact that the ruling party does not control all states means that sub-units can assert and exercise some level of autonomy.

Some of the contemporary issues challenging the Nigerian federation among other things include the distribution of power among the three tiers of government. Elaigwu argues that there is need to revise the legislative list to transfer mandates in favor of sub-national units. The federal government has insisted on creating strong connections with local government, which the states have resisted. Thus restoring the autonomy of the states that had been eroded over the years due to military intervention remains a crucial issue. Another challenge is the post 1999 emergence of threat related to Islamic fundamentalism in some of the northern states. Some northern states have insisted on the introduction of supreme *Sharia* law covering much broader areas than was traditionally practiced. Until 1999, *Sharia* law applied only to civil proceedings such as succession and divorce. However, since 1999, the Supreme *Sharia* expanded *Sharia* law to apply to criminal law. This development was introduced in more than ten northern states.⁶⁰ The urge for revising the legislative list and resources in favor of the states as well as the re-emergence of assertive sub-nationalism remain main issues challenging the contemporary Nigerian federation. Besides, corruption and weak institutions are key manifestations of the entire political economy of Nigeria. Dickovick wrote, 'Nigeria is typical case of Economic stagnation and dysfunctional political system in which formal institutions are subverted to raw power dynamics.'⁶¹ Overall, Nigeria has experienced some measure of stability since the return to civilian rule but continues to face resurgence of nationalism in the east, west and the Niger delta and sectarian violence in the north.

⁵⁹ Ambrose Ihekwoaba Egwim (n 51): 97–98, 109.

⁶⁰ Elaigwu (n 44).

⁶¹ Tyler Dickovick, 'Federalism in Africa: Origins, Operation and (in) Significance,' *Regional and Federal Studies* 24:5 (2014).

Whether the Nigerian federation has been able to reduce ethnic tensions and cleavages is an issue that remains contested. The tension among the bigger groups that brought the Nigerian federation to the brink of collapse in the 1960s has not withered away but has been partly localized by redrawing them into several small size states. Yet, they have rather regrouped themselves into six (three in the north and three in South). The military broke down the major ethno national groups into many small size and weaker states to avert ethno nationalism from facilitating secession while consolidating the center. In reality, the allocation of key positions at federal level including cabinet positions takes into account the geo-political zones.⁶² Nigeria's integrationist federation has not succeeded in constructing one coherent national Nigerian identity. The idea that Nigeria is a 'mere geographic expression' challenged by competing forms of identity such as regional, ethno national or religious is widely shared concern among Nigerian experts.⁶³ Contestations between North v. South, national identity v. ethno national identity have not disappeared and remains visible, particularly during presidential elections but has not led to open violence.⁶⁴ Since the return to civilian rule in 1999, main political parties seem to have entered into unwritten gentleman's agreement that requires the presidency to rotate between the north and south every eight years as a means to ease conflict among the major ethno national and regional forces.⁶⁵

⁶² Suberu (n 38): 124–125. The six zones include the three zones representing the major ethno national groups (Hausa-Fulani north-west, Yoruba south-west, Igbo south-east; and three other ethnically diverse states- north-east, north central and south-south (Niger Delta).

⁶³ Samuel Ojo Oloruntoba ed. *The Political Economy of Colonialism and Nation Building in Nigeria* (Cham: Palgrave Macmillan, 2022): 247.

⁶⁴ See for example Adebayo Adedeji, 'Federalism, Political Culture and the Question of Remaking Nigeria,' *Perspectives in Federalism*, 13:1 (2021): E91–113. Adedeji shows that there is lack of social cohesion in Nigeria as there is open contest between the need to construct one Nigerian National identity on one hand and an Igbo, Yoruba etc. based ethno national identity on the other.

⁶⁵ Anna B. and E. Oritsejafor, 'Ethnic versus National Identity and Satisfaction with Democracy: The Decline of the Ethnic Cleavages in Nigeria,' *Regional and Federal Studies* (2022): 8.

4.3.2 *Ethiopia*

4.3.2.1 *Context and the Rise of Cleavages*

Ethiopia's context is in some ways unique compared to the other three cases, as it defeated Italian colonialism in 1896 and the process of nation building was led by its own elite. The fact that it had enjoyed centuries of civilization meant the different ethno national and regional groups, despite long years of interaction, retained their own distinct features including their language and identity. Ancient experiences under quasi-autonomous kingdoms also serve as framework to claim self-government. There is no English or other foreign language legacy, unlike the three other federations where English is widely spoken and serves as unifying element. Amharic was supposed to play that role but its association with the then ruling elite and the crafting of the centralized nation state using Amharic has made it controversial.

The nation building process in Ethiopia had similarities with the process in Europe. It was led by a centrist elite that borrowed the European nation state as its model and, towards the end of the nineteenth century, brutally liquidated quasi-autonomous kingdoms that had existed for centuries. The left outs from the nation building process resent this and have continued to challenge the center. The debate between the centrist elite and the left outs is Ethiopia's major political paradox that the post-1991 federal system aimed to address but continues to challenge Ethiopia, making it very fragile. While cleavages in the three federations aim for integration or accommodation, in Ethiopia they also aim at exit: there are many nations potentially in search of a state of their own.

The concept of 'devolved autocracy' is often used in analyzing relations between the center and the provinces in historic Ethiopia, yet this fails to capture the essence of the relationship.⁶⁶ Ancient constitutional documents of the thirteenth century such as the *Kibra Negast* (Glory of the Kings) and constitutional practices deeply rooted in the notion of *Niguse Negast* (King of Kings)⁶⁷ demonstrate the dual, if not multiple,

⁶⁶ Christopher Clapham, 'The Ethiopian Experience of Devolved Government,' *Ethiopian Journal of Federal Studies* 1:1 (2013): 18.

⁶⁷ Haggai Erlich, *Ras Alula and the Scramble for Africa* (The Red Sea Press, 1991): 2.

centers of power in Ethiopia.⁶⁸ While the monarchy at the center served as a pillar of unity, various kinds of regional forces⁶⁹ representing diversity exercised important powers such as taxation, maintenance of local security, and regulation of trade.⁷⁰ The seat of Ethiopia's political capital was often called 'wandering', as it shifted from one province to another with the change of emperors.

Direct central authority was hindered by the vastness of the state's territory, the rough topography, absence of transportation and communications facilities, the demands of local nobilities for some autonomy, fiscal and manpower constraints, and ethnic, linguistic, and regional diversity. Regional forces enjoyed some autonomy, as kingdoms that merely acknowledged the existence of a distant emperor. The more powerful provincial kings—alone or in coalition with others—were sometimes contenders for the throne itself.⁷¹

The fact that the imperial power was open to potential contenders of power from the several provinces meant that state power was not highly ethnicized, at least before the emergence of the modern state under Menelik II (1889–1913). Greenfield wrote: 'struggles and rivalry lay between regions, later perhaps provinces, and not between tribal groups... tribalism had no place in Ethiopian politics.'⁷²

The decentralized feudal state structure changed radically with the emergence of a strongly centralized unitary state toward the last quarter of the nineteenth century spearheaded by Emperor Menelik. This was further consolidated during the absolute monarchy of Emperor Haile Selassie (1930–1974).⁷³ With the central government expanding its control to the south and south west along with the *Gebär* system,

⁶⁸ This is not to deny that communities in the periphery remained largely subjects when it comes to their role in the center.

⁶⁹ On occasions the center lost dominance as in Yodit/Gudit's attack on the Christian Empire in the tenth century; the campaign of Imam Ahmed (1527–43), and the Age of Princes (*Zemene Mesafint* 1769–1855).

⁷⁰ Bahru Zewde, *A History of Modern Ethiopia 1855–1991* (first published 1991, 2nd edn, James Currey, 2001).

⁷¹ Donald Levine, *Wax and Gold: Tradition and Innovation in Ethiopian Culture* (The University of Chicago Press 1965) 154–155.

⁷² Richard Greenfield, *Ethiopia: A New Political History* (first published 1965, Pall Mall Press, 2013): 46.

⁷³ Revised Constitution of Ethiopia Article 4.

which provided land—a critical resource—to the imperial army in the conquered territories and left the local people landless and servants of the new lords.⁷⁴ With the emergence of the centralized unitary state, Addis Ababa became not only the capital of Showa, Menelik's home province, but also of Ethiopia. With the recent emergence of the Amhara nationalism there is an effort to deny this reality but the evidence is mounting.⁷⁵ According to Edmond Keller and Clapham, of the 156 high ranking officials recruited and appointed by the central government (1944–1967), they were predominantly from Showa with only five coming from the peripheral areas. Nearly all provincial governors and cabinet members towards the end of 1960s came from Showa as well. Seventy percent of Ethiopia industrial activities were concentrated in Showa, Awash Valley and Asmara. Other sectors such as education and health also reflected massive imbalance between provinces with Showa standing at the top.⁷⁶ Showa then emerged as the epi-center of power, resources, and homogenizing centrist state, liquidating quasi-autonomous kingdoms.

Besides, in the imperial state, national integration was predicated on Christianity and the Amharic language, and was aptly known as Amharization.⁷⁷ To do this, Tedla Hailu, Belgium trained centrist Ethiopian elite

⁷⁴ Christopher Clapham, *The Horn of Africa: State Formation and Decay* (London: Hurst & Co., 2017): 34.

⁷⁵ For the recent development about Amhara nationalism see Tezera Tazebew, 'Amhara Nationalism: The Empire Strikes Back,' *African Affairs* 120:479 (2021): 197–313. There seems more than enough cause for Amhara mobilization resulting from displacements and killing of Amharas from different regional states. Yet the mobilization also has another dimension as it also brings the message 'let us make Ethiopia Amhara again' a new form of supremacist Amhara nationalism. Some even state Amhara elite as the only God given rulers of the country; 'Amhara is the cornerstone of being human' who taught the rest of Ethiopians how to eat, plough and dress' is now a new narrative.

⁷⁶ See for details Edmond Keller, *Revolutionary Ethiopia: From Empire to Peoples' Republic* (Bloomington: Indiana University Press, 1988), pp. 137–140; Christopher Clapham, 'Centralization and Social Responses in Southern Ethiopia' *African Affairs* 74 (1975): 73–75.

⁷⁷ John Markakis, 'The Crisis of the State in the Horn of Africa,' in John Markakis, Gunther Schlee and John Young, eds., *The Nation State: A Wrong Model for the Horn of Africa* (Max Planck, 2021): 25. Known provincial governor's name had to be changed as a result. Kumsa Bereda, the governor of Wollega was baptized and given a Christian name Gebre Egzabher. Ras Ali, King of Wollo was renamed Ras Michael. The last ruler of Janjero Abba Bagibo was renamed Gebre Medhin. The last king of Limmu Abba Gomboli became Gebre Selassie.

and close family of Emperor Haile Selassie wrote 'Ethiopia has to adopt policy of assimilation in which people will abandon their customs and social organization and adopt the language and religion of the Amhara.'⁷⁸ This change of identity should be carried out, Tedla insisted, by the Oromos, who would thus become Amharas, rather than the other way round, because the Amharas alone possessed a written language, as well as what he termed superior customs and religion.⁷⁹ In a government owned newspaper, it was written in 1926 (E. C), 'the intention of the Ethiopian government (the then ruling elite) is clear. Every Ethiopian should learn and speak Amharic, it is key for national unity and integration.'⁸⁰ This was reflected in the 1931, 1955 constitutions and several other policies and remained the framework for centralized Ethiopia until 1991. Some experts like Donald Levine⁸¹ even went to the extent of declaring 'greater Ethiopia as a very successful nation built from within' focusing on the historical interactions and the Amhara and Christian based integration, only to be taken by surprise following the emergence of the Ethiopian Student Movement (ESM), the national liberation movements and the post-1991 political developments. The loss of local autonomy following centralization, political and economic control by the ruling elite, the process of Amaharization and the *Gebar* system created a system of class and national oppression in most parts of Ethiopia particularly in the South and south west. Showa then emerged as the epi-center of power, resources, and homogenizing centrist state (using Amharic language and Orthodox Christian religion), liquidating quasi-autonomous kingdoms. The new ruling elite distinct both in terms of class and identity was to become a source of resentment and an incubator of ethno nationalism hence the articulation of these issues by the ESM, later by the national liberation movements and the slogans 'land to the tiller' 'the nationality question,' social justice and religious equality became the main tools for mobilization leading to the 1974 Revolution.⁸²

⁷⁸ See Richard Pankhurst, 'Tedla Hailu and the Problem of Multi-ethnicity in Ethiopia,' *North East African Studies* 5:3 (1998): 81–96.

⁷⁹ Ibid.: 86.

⁸⁰ Selam *Gazetta Tuhsas* 19, 1926 E. C.

⁸¹ Donald Levine, *Greater Ethiopia: The Evolution of a Multiethnic Society*, 2nd edn. (Chicago: The University of Chicago Press, 2000).

⁸² The 1955 Revised Constitution Article 125 and 126; 1987 CONST. Article 116.

The military junta (1974–1991) made gestures to address the emerging demands from ethno national and regional groups when it came to power and toward the end of its era. It declared all nationalities to be equal but did not end the marginalization from power and resources and failed to ensure the right to self-rule. More important, its rigid insistence on military solutions to political issues blocked all hopes for peace. A nominal form of regional self-rule was included in the 1987 constitution, but by then it was too little too late to attract already emboldened ethno national groups.⁸³

Central power was no longer accessible to various contenders: identity began to matter for inclusion or exclusion from power, and in the process it began to be politicized. Thus at the heart of the reason for transformation from regional/provincial-based movement to ethno-nationalism remains the exclusionist and centrist nation state. As will be illustrated later, ethno nationalism is a reaction to centralized state policy.

The process of centralization and homogenization was far from smooth. It faced serious challenges initially in the form of provincial rebellions headed by nobilities, various peasant protests, and later in a more radical form from university students. As political parties were banned in the country, the initial resistance against the process of centralization emerged in the form of peasant rebellions such as those from Tigray (1943), Gojjam (1968), Bale (1963/1970), Yejjju (1948), and Gedeo (1960). Conflict in traditional Ethiopia manifested mainly in the form of provincial rebellion against the center and aimed at modest reforms without upsetting the whole system. Secession was also not on the agenda.⁸⁴ The opposition mainly looked for adjustment and restoration of violated rights like better administration, lower taxes, respect for local autonomy, and reduction of corruption.

The resistance against the centralized monarchy intensified in the early 1970s as most of the sources of discontent were articulated by the young, radical, and left-oriented university students. The ESM emerged as an amorphous, ideologically and ethnically diverse university students' association. The Movement spawned many political parties and together challenged imperial rule. This resistance not only called for state reform

⁸³ Andargachew Tirunch, *The Ethiopian Revolution: 1974–1987* (Cambridge: Cambridge University Press, 1993).

⁸⁴ Gebru Tareke, *Ethiopia: Power and Protest: Peasant Revolts in the Twentieth Century* (Cambridge University Press, 1991).

but also even at times challenged the state itself and the resistance brought new forms of leadership, social composition, and ideological orientations.⁸⁵ The student movement's slogans—'land to the tiller,' 'end to national oppression,' 'equality of religion,' and 'social justice'—were very popular in taking on the imperial regime.⁸⁶ Influenced by the Bolsheviks, the ESM argued that post-Menelik Ethiopia constituted a 'prison house of nationalities'⁸⁷ and that the 'nation building' project was a failure; the activists called for an end to 'national oppression' through the grant of the right to self-determination to the nationalities.⁸⁸ Since the 1970s, the 'nationality question', that is, addressing the claims by ethno national groups to self-rule and political autonomy, fair representation in public institutions, and ensuring equality, has remained a crucial point in the agenda of Ethiopia's political struggles.

As leftist organizations, nearly all sympathized with the 'nationality question.' Yet, apart from sharing the view that the nationality question needed to be addressed, the exact *meaning* and *scope* of this vague concept and the strategy to address it was far from clear. Depending on their proposed solution to the 'nationality question', slowly many rival groups emerged. One camp constituted the Ethiopian People's Revolutionary Party (EPRP since 1972), while the other became the all Ethiopian Socialist Movement (nicknamed MEISON since 1968). Both parties claimed they were multi-ethnic and chose to provide a solution to the nationality question by subsuming it along class lines.⁸⁹

The ESM became the gravedigger of the Emperor and major driving force behind the 1974 Revolution. The wide support accorded to the students and the failure to introduce even modest reform by the aging

⁸⁵ Ibid.: 29.

⁸⁶ Kiflu Tadesse, *The Generation Volume 1: The History of the Ethiopian People's Revolutionary Party* (Kiflu Tadesse Publishing, 1993). This very controversial volume was translated and published in Amharic in 2014.

⁸⁷ Ibid.: 121. See Walleigne Mekonnen, 'On the Question of Nationalities in Ethiopia,' *Struggle*, (Bulletin, 1969). For the ideological roots of post-1991 Federal Ethiopia see John Young, 'Bolshevism and National Federalism in Ethiopia,' in John Markakis, Gunther Schlee and John Young, eds., *The Nation State: A Wrong Model for the Horn of Africa* (Max Planck, 2021).

⁸⁸ Bahru Zewde, *The Quest for Socialist Utopia: The Ethiopian Student Movement 1960–1974* (James Currey, 2014): 218.

⁸⁹ Ibid.: 261.

Emperor brought about the 1974 Revolution. As popular as the Revolution might have been, it was, however, hijacked by the Military Junta (1974–1991), otherwise known as the *Derg*, a committee of 120 junior military officers, the only organized force at the time. The Revolution gave a mortal blow to the old monarchy including its land holding system (*Gebar*) but except for the change of source of political legitimacy from Solomonic genealogy⁹⁰ to Socialism as a new tool for building the ‘nation state,’ the centralist character of the state and its policy to the emerging demand of ethno nationalist groups remained intact and was even strengthened in its brutal form to a degree that far exceeded the imperial regime.

MEISON initially sided with the military on the assumption that it would outsmart it and take control of power itself. The ‘socialist’ regime (1974–1991) gave rise to a protracted civil war and political instability that brought the country to the brink of collapse by 1991. Despite sharing same leftist ideology, rivalry between the EPRP and MEISON and the conflicts with the junta brought on the ‘Red Terror’ and ‘White Terror’ in the early 1970s, which consumed the lives of thousands of young Ethiopians from all sides. The story of multi-ethnic, class-based parties thus came to a tragic end. And this period of *militant political culture* left a legacy that continues to haunt Ethiopia as was seen following the 2005 elections, 2015 and the post 2018 period.⁹¹

What transpired toward the end of the 1980s, when the state failed to address demands of ethno nationalist groups, was a failed ‘nation building’ project⁹² that politicized identity and created a privileged centrist political elite whose values and identity was equated with the state. As in many other failed ‘nation building’ projects, a privileged ruling elite’s identity and language were used as a mask to impose the centrist ruling elite’s identity, language, and religion on others. Identity and language became a means for *exclusion or inclusion*, a source of pride, or a source of social and psychological trauma. The bulk of the society were marginalized by the state and considered as secondary class,

⁹⁰ John Markakis, *Ethiopia: Anatomy of Traditional Polity* (Clarendon Press, 1974). The Derg as well dissociated itself from Orthodox Christianity and that helped Muslims in the country.

⁹¹ Jon Abbink, ‘Discomfiture of Democracy? The 2005 Election Crisis in Ethiopia and its Aftermath,’ *African Affairs* 105:419 (2006): 173.

⁹² Greenfield (n 72): 88.

not citizens. Their identity was viewed as inferior, stigmatized, and traumatized and this explains the passions and emotions associated with the protracted nature of intergroup conflicts. The conflict became nastier and protracted as ethno nationalist groups sought not only to gain shares in power and resources but also to reverse their inferior status and claim back their 'collective self-esteem.' While many actors and peace mediators often focus on power and resource inequalities, the non-material causes of conflict are often the core element of mobilization: the search for respected collective self-esteem, fear of genocide, ethnic cleansing and collective security.⁹³ The negative historical interaction among the political elite left deep-rooted mistrust in which selected history was and is used as a tool for mobilization in order to deal with real or perceived threats. As is often said 'identity is the fruit of history'⁹⁴ but with a view to making sense of the present.

Thus in Ethiopia there has been a very strong ethno national based mobilization against the center for the majority of the twentieth century. By 1991, it was a coalition of ethno national based liberation movements that dismantled the centrist military rule by force and formally introduced the federal system following the end of the four year transition (1991–1994). The number of national liberation fronts is perhaps a record within the African continent. While class has been presented as an alternative form of mobilization in the early 1970s (by EPRP and MEISON), leadership crisis and power struggle within the clandestine parties, brute force by the military, and the fact that Ethiopia by then was largely a peasant-based rural country, the absence of a middle class meant there was little appeal for class based mobilization. Class in content, ethno national in form was TPLF's core slogan. It was more appealing for national liberation movements to explain the impact of political and economic marginalization and the subordinate position of their respective ethno-national groups and fight the military. As will be shown later, after Meles's death, the class character diminished, the new leaders shifted along liberal

⁹³ William Zartman, 'Dynamics and Constraints in Negotiations in Internal Conflicts,' in I. William Zartman ed., *Elusive Peace: Negotiating an End to Civil Wars* (The Brookings Institution, 1995): 5.

⁹⁴ Nancy Bermeo, 'Conclusion: The Merits of Federalism,' in Ugo Amoretti and Nancy Bermeo eds., *Federalism and Territorial Cleavages* (The Johns Hopkins University Press, 2004): 461.

integrationist lines (details in Sects. 4.3.2.4 and 4.4.1), quality of leadership went down and ethno nationalism became the dominant feature leading to many vertical and horizontal conflicts.

In comparison with the other federations under discussion, in Ethiopia, the extreme centralization of power at the center and the brute use of force to deal with political issues was an incubator to the ethno-national based liberation fronts that emerged in the early 1970s. It explains the radicalization of the ESM and subsequent emergence of hardliner ethno-national based liberation fronts. Besides, the failure to dialogue and compromise to resolve political issues characterizes modern Ethiopian politics. It is hard to find something comparable to the political settlement in post-apartheid South Africa or Kenya's post-2007 political deal following the election crisis. Whoever holds power in Addis is often a suspect. Entrenched, territorially-based and politically mobilized cleavage is the outcome. The distinct and radical nature of the post-1991 Ethiopia's federal system and its link with ethno national based autonomy can only be understood in this context.

4.3.2.2 *Ethiopia's Federalism: Promises, Paradoxes*

Ethiopia's post-1991 federal system was meant to provide a solution to the age old issue framed by the ESM in the 1970s as the 'question of nationalities.' The main architect of the new constitution, the ethno nationalist coalition of Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) under the leadership of the Tigray People's Liberation Front (TPLF), held that a new and democratic Ethiopia could only be constructed through the voluntary and consensual association of its parts, the 'nations, nationalities and the people.'⁹⁵ As the EPRDF considers itself as successor of the ESM of the 1970s, it committed itself to providing political solution to the nationality question.⁹⁶ Political reality (no less than a dozen armed ethno national and regional

⁹⁵ Gebru Tareke (n 84): 202.

⁹⁶ See Sarah Vaughan, *The Addis Ababa Transitional Conference of July 1991: Its Origins, History and Significance* (1994).

groups)⁹⁷ dictated by ethno nationalist mobilization and its leftist ideological commitment seem to be the explanations for the focus on ethnic based organisation, including a right to secession.

The division of authority between the federal government and the states is one of the hall marks of federations. Federalism is all about which level of government gets what competencies and the peaceful struggle each level makes to expand its powers.⁹⁸ Central to this question is thus, which authorities are divided between the two levels of governments. At a formal level and as response to the age old demand for self-government, the Ethiopian constitution provides very generous autonomy to regional states. In addition to wide policy making mandate, it even ensures the right to self-determination to ethno national groups (Article 39) and declares the ‘nations, nationalities and peoples’ as sovereign. The federal government has enumerated and limited powers (Article 51) and the states hold residual powers. The Constitution also comprises a brief account of some state powers in addition to the reserve power (Article 52).

The Constitution provides neither for the ‘necessary and proper’ clause nor for any express comprehensive list of shared powers. As a result, it seems difficult to extend the federal powers in light of the fact that the Constitution commits itself more towards self-determination and ‘sovereignty of Nations, Nationalities and Peoples.’ However, it is possible to argue that given the terminology employed in stipulating some of the provisions, there is a lot of ambiguity in demarcating the respective mandates of both levels of governments. The Constitution under Article 51 empowers the federal government to ‘*formulate and implement the country’s policies, strategies and plans in respect of overall economic, social and development matters...; ...establish and implement national standards and basic policy criteria for public health, education, science and technology...*’ One may state that this is perhaps more than the ‘necessary and proper’ clause for it grants the federal government with wide powers on economic, social, health and education aspects. It seems to put primary

⁹⁷ For details Young (n 87) and Tesfa Bihonegn, *Federalization with Constitutional Guarantee to Secession: Controversies, Paradoxes and Imponderables, Regional and Federal Studies* 25: 1 (2015).

⁹⁸ John Kincaid, ‘Division of Powers,’ in John Kincaid, Wesley Leckrone eds., *Teaching Federalism: Multidimensional Approaches* (Cheltenham: Edward Elgar, 2023): 50.

responsibility on the federal government to determine major policy directions and standards. This expressly covers all economic and social issues that were federalized during the 1930's in the United States. There is no doubt that these powers cover the bulk of concurrent power on a vast field of social and economic affairs as stated in other federations. However it is also possible to argue with equal force that if one follows the terms closely, the powers of the federal government even in these vital areas do not seem exhaustive. The same Constitution also empowers the states, among other things 'to formulate and execute economic, social and development policies, strategies and plans for the state.'⁹⁹ The big question is to draw the borderline between the two but certainly the legal framework of most of the policy-making areas remains concurrent leaving wide policy making margins to regional states.

The comparative study shows that the constituent states in Ethiopia rather have an overwhelming amount of power at least so far as self-rule is concerned. The constitutions of Nigeria, South Africa and Kenya (covered in this chapter) do not provide such a wide autonomy on policy matters to states and as will be shown later groups have no right to self-determination. The states in these three federations (except the Western Cape of South Africa) do not also have their constitutions. Besides, the constitution is clear to authorize the states 'to formulate and execute social and development policies, strategies and plans of the state' within the overall federal framework. As a result, formally speaking the states are given wide powers. However, this needs two major qualifications as for instance in the field of foreign policy and the sharing of federal power, there is actually very little to compare because the Ethiopian federal structure is designed completely with an emphasis on self-rule but not much on shared rule, as the second chamber is not involved in law and policy making (see chapter three). Second major limitation is the paradox between promise and reality explained in the following two sub sections.

4.3.2.3 *EPRDF Era Federalism*

In theory, the division of power envisaged in the Constitution (articles 51 and 52) along with the right to self-rule allows the states to design their own socio-economic and development policies that fit their local context subject only to broad federal-wide standards set in the Constitution.

⁹⁹ Article. 52 (2) c.

However, a clearer picture of the federal system in Ethiopia can be drawn if one looks at the nature and operation of the party system, its ideology, and the centralizing political dynamics that has affected the autonomy of the regional states significantly. Many critics point to the paradox between generously granted mandate of regional states and a centralized federal system in practice.¹⁰⁰ The guiding ideology of the EPRDF was ‘revolutionary democracy.’ This is an ideology that was rigidly implemented during the pre-1991 civil war and that continued even after the adoption of the new constitution that enshrines political pluralism and multiparty democracy. Revolutionary democracy promotes an exclusive control of power (at all levels of governments) by a vanguard party that assumes a leading and hegemonic role. The effect is that the ruling party controls not only the institutions of the federal government but also all the regional state governments in the federation either directly through its member parties (the four coalitions each lead the four relatively influential states) or indirectly through affiliated parties that controlled the other five states by then.

Besides, the design of major policies and the nomination, election, and appointment of key political figures both at the federal and regional state level were made and effected through the centralized party structure. Thus, the role of federalism and the regional states was reduced to merely serving as implementing rubber-stamping institutions of a *vanguard party* at the helm of power, the institutions being subservient to party interests. The implication is that the autonomy of the states was limited in practice, and the party structure *overshadows* and *weakens* the federal and regional government institutions. The party structure and its decision-making procedures undermine the federal division of power and subordinate the state governments to the whims of the party. In this regard, Ethiopia is not as federal as promised by the Constitution. In reaction to weak regional state leadership and a perception of lack of regional state autonomy that failed to ensure the right of the Oromos in Addis Ababa and that did not resist the federal government’s ‘integrated development plan,’ ‘We want genuine self- rule’ was one of the popular slogans during the widespread protests in Oromia in 2015.

¹⁰⁰ Lovise Aalen, *Ethnic Federalism in a Dominant Party State: The Ethiopian Experience 1991–2000* (Bergen: Chr Michelsa Institute, 2002); Assefa Fiseha, ‘Federalism, Development and the Changing Political Dynamics in Ethiopia,’ *International Journal of Constitutional Law* 17:1 (2019).

More serious development that strengthened the centralization drive under EPRDF pushing federalism and self-rule to the margins was the emergence of the political ideology of the developmental state in 2001/2002,¹⁰¹ subsequent to the splits within the TPLF in 2001. Many of the critical development projects were centrally designed and this has brought resentment from the states. For example, while administration of land belongs to the states, federal laws regulating land and large scale agricultural developments extended the mandate of the federal government to administer land, making state mandate hollow. The federal government violated the constitution by inducing the states to delegate their mandate of administering land while the constitution envisages only downward delegation. All these developments fueled ethno nationalism and the perception of marginalization from the states. In particular, the Addis Ababa- Oromia Integrated Development Plan, the aggressive pursuit of developmental and centralized projects and the centrally proclaimed land-related laws and policies were instrumental in triggering the protests in Oromia regional state in 2015 that soon expanded to the Amhara region resulting in regime change in 2018.

Besides, despite a two decade and half experiment with federalism, the quest for genuine self-rule, political inclusion, protection of citizenship rights, autonomous institutions, social cohesion and transition to democracy remain far from realized. The developmental state implied the federal government focused more on economic growth and socio economic development pushing democracy and self-government to the sidelines. True, Ethiopia remained relatively stable, peaceful and key regional player in the Horn of Africa but obsession with economic growth under centralized authoritarian rule resulted in head on clash between development, federalism and self-government.¹⁰² The federal system rested in tacit practice based on three pillars: (i) a “big man”—Meles (the most powerful Prime Minister who passed away in 2012), whom Clapham dubs ‘the philosopher-king of the EPRDF’,¹⁰³ (ii) democratic centralism (Meles’s main tool); and (iii) the vanguard party. The ‘big man’ has passed on, democratic centralism is gone and with the gradual shift of ideology

¹⁰¹ Assefa Fiseha, ‘Federalism and Development: The Ethiopian Dilemma,’ *International Journal of Minority and Group Rights* 25:3 (2018).

¹⁰² Ibid.

¹⁰³ Clapham (n 74): 69; for the ideological roots of post-1991 Federal Ethiopia see Young (n 87).

(details in Sects. 4.3.2.4 and 4.4.1), power struggle continued along the fault lines. EPRDF era federalism claimed its roots to Bolshevism and the Bolshevik's were aware that ethno nationalism could threaten the center and thus focused on class that kept sub state nationalism under control. This changed under PP creating favorable condition for ethno nationalism.

The effect of one party hegemony and the subsequent power struggle within the party is very weak institutions. Federalism and devolution as a means to manage diversity and conflict assumes effective institutions for the day to day operation of political business, intergovernmental platform for bargain and negotiation and impartial institutions such as Supreme Court or constitutional court to mediate intergovernmental disputes. Disagreements are expected to be resolved through compromise and dialogue using the existing political institutions such legislative bodies, intergovernmental relations, party level negotiations and if that fails using legal means: the supreme court/constitutional court that serves as the ultimate guardian of the constitution. Constitutionalism and the rule of law require that ultimately the political institutions submit to the guardian of the constitution. Ethiopia failed to build these institutions and the EPRDF, now rebranded as Prosperity Party (PP, after the Tigray Peoples Liberation Front withdrew from EPRDF) relied on its own party machinery including the tight ideology and this worked to some extent: at least partly because of democratic centralism, combined with elitist leaders such as Meles Zenawi (1991–2012).¹⁰⁴ Meles led EPRDF viewed ethno nationalism as transient that would wither away with the emergence of middle class. EPRDF had strong ideological and class features manifested in the form of revolutionary democracy and developmental state.¹⁰⁵ It was ethnic coalition but had class (peasant-based) and ideology content that hold it together.¹⁰⁶ Gradually the class and ideological component (the operative party constitution that held the EPRDF together) withered away with lack of competent leadership and

¹⁰⁴ For details on this see Aalen (n 100); Alex de Waal, *The Real Politics of the Horn of Africa: Money, War and the Business of Power* (Malden, Mass: Polity Press, 2015).

¹⁰⁵ Gebru Asrat, *Sovereignty and Democracy in Ethiopia (Amharic)* Addis Ababa (2015): 148–149; Jean-Nicolas Bach, 'Abyotawi Democracy: Neither Revolutionary nor Democratic, a Critical Review of EPRDF's Conception of Revolutionary Democracy in Post-1991 Ethiopia,' *Journal of East African Studies* 5:4 (2011): 641.

¹⁰⁶ See for details Young (n 87).

militant ethno-nationalism took center stage and became default identity. As one political observer stated, ‘the current ruling party (PP) is politically and ideologically orphaned EPRDF minus the TPLF.’¹⁰⁷ At least during the first one year, PP did indicate a shift towards integrative liberal federation, ended the developmental state replacing it by ‘home grown economy’ and the Amhara Democratic Party (ADP) wing of PP openly advocated for geographic federalism. In the absence of competent leaders and with the fragmentation of the party system and its incoherent ideology, there was literally nothing that could serve as a platform to sort out normal political business. Under PP, there is adherence neither to party rules nor to the real constitution and slowly deinstitutionalization is leading to one man rule.

During 1995–2015, the EPRDF led federal government was perceived as dominated by the TPLF, thus wide spread protests in two of the bigger regional states- Oromia and Amhara. OPDO and ANDM were increasingly perceived as puppet parties that did not genuinely represent the Amhara and Oromo interests in the federal government. The extreme centralization of power, leadership incompetence and crisis within EPRDF and the regime’s failure to introduce reform that match the demands and perception of marginalization created resentment and was one of the causes of the 2015 protests in Oromia and Amhara regions that resulted in the emergence of new leadership led by Dr. Abiy Ahmed within EPRDF in 2018.

There was a much hoped for transition to democracy with the coming to power of the new leadership in 2018. A hidden coalition later known as *Oro-Mara* to imply Oromo Peoples Democratic Organization (OPDO)—Amhara National Democratic Movement (ANDM) or narrowly ‘Team Lemma’ emerged within the broader EPRDF. This was known within the popular protests and the international community as ‘the rise of some reformist elements from within the coalition who embraced the people’s demand for change’¹⁰⁸ and identified as agent of change. The role and hope given to ‘Team Lemma’ in bringing reform and democratic transition in Ethiopia was very high.

¹⁰⁷ Interview Addis Ababa 20 May 2021.

¹⁰⁸ Walelign Shemseden, ‘Peaceful Transition to Democracy in Ethiopia: Why is it so Enigmatic?’ *addisstandard*/<https://addisstandard.com/op-ed-peaceful-transition-to-democracy-in-ethiopia-why-is-it-so-enigmatic/>, August 26, 2020.

PM Abiy's ascendance to power saw a change in the power dynamics within EPRDF—the coming to power of the OPDO later renamed as Oromo Democratic Party- (ODP)—the party of the new Prime Minister. His election by the party was preceded by three years of protests that forced Hailemariam Desalegn to resign. The new PM moved rapidly to open up the political space, reshuffling the cabinet and bringing more women into it; ending the state of emergency that was declared twice during the protests, releasing thousands of prisoners; allowing banned and exiled political organizations and individuals to return home and lifting restrictions on internet and social media. Importantly, he proclaimed multiparty democracy as the only route for the country's political future. Exiled opposition groups and armed movements that came from exile were allowed to be engaged in the political dialogue facilitated by the National Election Board of Ethiopia (NEBE). The NEBE itself went through some reforms. While the chairperson- Birtukan Midekssa- a former opposition party leader that was in exile was handpicked, the other four members of NEBE were appointed following consultations with some key opposition political parties. The new government also reformed election and political party law. A draconian civil society law that limited the role of non-governmental actors since 2006 was also reformed and opened space. As a result, Abiy was quickly branded as 'a reformer' who would end the one party rule and lead the transition to democracy.¹⁰⁹ The immense popularity he earned during the first few months as a result of the measures taken and the effort to bring peace between Ethiopia and Eritrea¹¹⁰ (later proved to be a secret war pact between Abiy and Esayas against Tigray) led to the award of the 2019 Nobel Peace Prize.¹¹¹ Many thus hoped that this time around Ethiopia was on track towards genuine federalism and democratization, abandoning authoritarian rule.

¹⁰⁹ Tsedale Lemma, *After the Postponed Elections: Ethiopia's Fragile Transition Hangs in the Balance*, available at <https://blog.bti-project.org/2020/08/24/ethiopias-fragile-transition-hangs-in-the-balance/>.

¹¹⁰ Latest developments show Ethiopia-Eritrea relations may have improved but it was a tactical pact between leaders of the two countries to wage war against TPLF.

¹¹¹ Mattha Busby and Martin Belam, Nobel Peace Prize: Ethiopian Prime Minister Abiy Ahmed Wins 2019 Award—as it happened <https://www.theguardian.com/world/live/2019/oct/11/nobel-peace-prize-greta-thunberg-abiy-ahmed-jacinda-ardern-among-those-tipped-win-live-news>.

4.3.2.4 *PP Era Federalism and Self Government*

We now look into the policies and decisions of the new elite and how it impacts federalism and the already weak institutions. The argument here is that there is continuity in terms of authoritarianism but deinstitutionalization and authoritarianism have been taken to a new height. The use of violence as a means to suppress political demands has also become regime's main feature. The number of vertical and horizontal conflicts that erupted since PP assumed power are indeed a record since the emergence of modern Ethiopia and their effect devastating. The first indicator of authoritarian centralization in Ethiopia is the federal government's action and the process of removal of regional state heads. Since the new government came to power in 2018, many of the leaders of the regional states have been removed by the ruling party disregarding regional states mandate to self-rule and the people's right to elect their own leaders. The latest developments indicate the country is sliding back to authoritarianism with the new ruling engaged in the same old tactics. While there is continuity in terms of practicing centralized federalism both under EPRDF and its successor PP, the PP's federalism is distinct in two respects. As witnessed in the devastating wars in Tigray, the South (Sidama and Wolyta), Oromia and lately in the Amhara region, the regime's determination to use violence to crush political demands for self-government and inclusion is a record in Ethiopia's recent history.¹¹² As will be shown later, PP has also shifted its narrative towards integrative federalism¹¹³ and as part of that liquidated former autonomous coalition and affiliate member parties turning PP to a single national party. Since then PP-TPLF relations have gone from bad to worse leading to

¹¹² According to some sources Abiy's recent war has caused death to millions of people in Ethiopia and though much is talked about Ukraine, Tigray's war remains world's largest one. See Mark Green, *Ukraine Understandably the Focus, but Ethiopia's Tigray Conflict is World's Largest*, available at <https://www.wilsoncenter.org/blog-post/ukraine-understandably-focus-ethiopias-tigray-conflict-worlds-largest>, October 25, 2022.

¹¹³ Recently issued government sponsored study claims that the most controversial clauses of the constitution that aim to empower ethno national groups have to be amended hinting a possible shift towards 'geographic federalism.' See a research Report entitled 'FDRE Constitution after Three Decades: Inquiry into Whether and What to Amend' *Policy Study Institute* October 2022.

a destructive war, PP trying to dislodge the regional state and replace it by its own puppet while TPLF trying to ensure its self-rule. The result is a mutually assured destruction with a long term effect for the country. Popular calls for democracy and genuine self-government are being hijacked by centrist elite that is imposing its will by force including waging civil war in regional states. This is happening despite popular support for democracy and federalism as indicated by *Afrobarometer*.¹¹⁴ Instead of providing political solution to major issues (e.g. a more inclusive political system and more working federal languages, transition to democracy and genuine self-rule were among others the most popular slogans of the popular protests since 2015),¹¹⁵ the new trend is to use force to terrorize people. Emergency decrees, command posts, party machinery and personal rule have been used to remove regional state heads violating the autonomy of regional states. From Somali region¹¹⁶ to Sidama,¹¹⁷

¹¹⁴ Overwhelming majority of Ethiopians support federalism, democracy, seek accountable governance. While no less than 70% of the population support federalism there is sharp division on whether Ethiopia should retain the ethno national federation or should shift to integrative federation. *Afrobarometer* 30 October 2020; Recently issued government sponsored study claims that the most controversial clauses of the constitution that aim to empower ethno national groups have to be amended hinting a possible shift towards 'geographic federalism.' see a research Report entitled 'FDRE Constitution after Three Decades: Inquiry into Whether and What to Amend' Policy Study Institute October 2022.

¹¹⁵ Rene Lefort and William Davison, *Federalist Façade for Centralist Front*, available at <https://www.ethiopia-insight.com/2019/08/18/federalist-facade-for-centralist-front/> August 18, 2019.

¹¹⁶ The federal government and former president of the Somali regional state Abdi Mohamed Omar 'Illey,' the regional state's long serving president 2010–2018 (now in jail) established the Somali region special force as a means to counter the Ogaden National Liberation Front (ONLF). The special police was accused of committing extra-judicial killings, torture and gross human right violations in the region. While holding Illey who was accused of violations of human rights to account is right, the way he was removed from power however remains controversial. See Tobias Hajmann, *Fast Politics, Slow Justice: Ethiopia's Somali Region two Years After Abdi Illey*, Briefing Paper 11 September 2020.

¹¹⁷ Morris Kiruga, *The Sidama Crisis and Escalating Demands for Statehood Challenge Ethiopian Constitution*, available at <https://www.theafricareport.com/15883/the-sidama-crisis-and-escalating-demands-for-statehood-challenge-ethiopian-constitution/Friday>, August 2, 2019; William Davison, *Kulle Kursha As Southern Nations Break Free, Pressure Mounts on EPRDF*, available at <https://www.ethiopia-insight.com/2018/11/28/as-southern-nations-break-free-pressure-mounts-on-eprdf/>, November 28, 2018.

Oromia,¹¹⁸ Tigray,¹¹⁹ Wolayta,¹²⁰ and lately the Amhara region,¹²¹ the actions taken by the federal government particularly after the assassination of a prominent Oromo singer Hacchalu Hundessa on June 29, 2020 speak for themselves: one party show and military rule including the use of countless emergency decrees to remove legitimate leaders and stop public demands, violence and excessive use of force,¹²² massive abuse of human rights,¹²³ political killings and imprisoning key opposition political leaders (including Jowar Mohammed,¹²⁴ Lidetu Ayalew,

¹¹⁸ Tsedale Lemma, *After the Postponed Elections: Ethiopia's Fragile Transition Hangs in the Balance*, available at <https://blog.bti-project.org/2020/08/24/ethiopias-fragile-transition-hangs-in-the-balance/>; Etenesh Abera and Biah Jalan, *Analysis: Oromia Reeling from State Violence after Security Forces Kill, Injure a Staggering number of Protesters*, available at <https://addisstandard.com/analysis-oromia-reeling-from-state-violence-after-security-forces-kill-injure-a-staggering-number-of-protesters/addisstandard/>, August 19, 2020.

¹¹⁹ Assefa Fiseha, 'Tigray: A Nation in Search of Statehood,' *International Journal of Minority and Group Rights* (2023).

¹²⁰ Medihane Ekubamichael, *Weeks after Army's Violent Crackdown in Wolaita, Prosperity Party Removes Zonal Chief*, available at <https://addisstandard.com/news-weeks-after-armys-violent-crackdown-in-wolaita-prosperity-party-removes-zonal-chief-administrator-others/addisstandard/>, September 2, 2020; Minyahil Tadesse, *It's time to Respect the Wolayta People's Constitutional Rights*, available at <https://www.ethiopia-insight.com/2020/08/28/its-time-to-respect-the-wolayta-peoples-constitutional-rights/>, August 28, 2020; Mulugeta G. Berhe, *Ethiopia's Political Crisis Plays Out in the Regions. Why it's a Federal Problem 2020*, available at <https://theconversation.com/ethiopias-political-crisis-plays-out-in-the-regions-why-its-a-federal-problem-144893>, August 27.

¹²¹ See details Why Ethiopia's Amhara Militiamen are battling the army at <https://www.bbc.com/news/world-africa-66496137> accessed August 18, 2023.

¹²² Ayele Woubshet, *Our 'Protectors' in Blue: Police Brutality and Misconduct in Ethiopia*, available at <https://www.ethiopia-insight.com/2020/08/14/our-protectors-in-blue-police-brutality-and-misconduct-in-ethiopia/>, August 14, 2020.

¹²³ Declan Walsh, *Ethiopia's War Leads to Ethnic Cleansing in Tigray Region, U.S. Report Says* <https://www.nytimes.com/2021/02/26/world/middleeast/ethiopia-tigray-ethnic-cleansing.html>, May 23, 2021; Servet Gunergok, *Ethnic Cleansing Being Committed in Tigray: Report*, available at <https://www.aa.com.tr/en/americas/ethnic-cleansing-being-committed-in-tigray-report/2158784>, May 23, 2021; See Amnesty International report, *Beyond Law Enforcement: Human Rights Violations by Ethiopian Security Forces in Amhara and Oromia* <https://www.amnesty.org/download/Documents/AFR2523582020ENGLISH.PDF>.

¹²⁴ The government has charged Jawar and others of terrorism but were released. See Elias Meseret, *Ethiopia Charges Prominent Opposition Figure with Terrorism*, available at https://www.washingtonpost.com/world/africa/ethiopia-charges-prominent-opposition-figure-with-terrorism/2020/09/19/52249eb0-fa6c-11ea-85f7-5941188a98cd_story.html.

Bekele Gerba, several senior OLF leaders, Eskinder Nega (many of them released later) and thousands of junior opposition party members) and restricting media outlets and internet.¹²⁵ Command posts imply civilian rule is being suspended and replaced by military rule and owing to its frequency and the wide geographic coverage; it has become the new normal. Abiy himself appears in decorated military uniforms (former army colonel) during crisis and that informs well into his style of governance. Nearly all regional states have gone through either emergency decree or command post at one time or another. It is as if militarism has replaced federalism.

More serious political parties that pose electoral challenge to the ruling party such as Oromo Federalist Congress, faction of the Oromo Liberation Front and TPLF were either marginalized or branded as terrorists. These are the major parties that are calling for more inclusion at the center and genuine self-government or even a confederation. The marginalization has thus peculiar dimension: it pushes the ethno national based parties and creates favorable ground for parties that favor a more centralized form of government.¹²⁶

¹²⁵ Since June 2020 many media houses critical of the government have been shut down (Asrat media, Oromo Media Network, Tigray TV, Dimtsi Weyane, and during the war in Amhara in 2023 harsh measures and closure of media continued). The internet was halted for 23 consecutive days in Addis and shut down in Tigray; Girma Gutema, *OMN: An 'Alien' Star in Ethiopia's Skewed Media Universe is 'Cancelled'*, available at <https://www.ethiopia-insight.com/2020/08/12/omn-an-alien-star-in-ethiopias-skewed-media-universe-is-cancelled/>, August 12, 2020.

¹²⁶ Rene Lefort, 'Ethiopia's War in Tigray is 'But the Tip of the Iceberg When it Comes to Conflicts Ravaging the Country,' *The Africa Report*, available at <https://www.theafricareport.com/84350/ethiopias-war-in-tigray-is-but-the-tip-of-the-iceberg-when-it-comes-to-conflicts-ravaging-the-country/>, April 30, 2021; See Ethiopia's Democratization at Risk, DW, available at <https://www.hrw.org/news/2019/04/08/ethiopias-transition-democracy-has-hit-rough-patch-it-needs-support-abroad>, accessed September 9, 2020; Walelign Shemseden, Peaceful Transition to Democracy in Ethiopia: Why is it so Enigmatic? *addisstandard*/ <https://addisstandard.com/op-ed-peaceful-transition-to-democracy-in-ethiopia-why-is-it-so-enigmatic/>, August 26, 2020; Rene Lefort, Preaching unity but flying solo, Abiy's ambition may stall Ethiopia's transition <https://www.ethiopia-insight.com/2020/02/25/preaching-unity-but-flying-solo-abiys-ambition-may-stall-ethiopias-transition/>, February 25, 2020; Dawit Woldegiorgis, *Ethiopia: On the Brinks*, available at <https://borkena.com/2019/04/10/ethiopia-a-country-on-the-brinks-by-dawit-woldegiorgis/>, April 10, 2019.

The second indicator is the ideological framework of the ruling party. Abiy's close advisor is quoted to have said 'we will continue to implement Menlik's nation building project that was disrupted by EPRDF in 1991.'¹²⁷ This was centralized Ethiopia that liquidated quasi autonomous kingdoms that existed for long through brutal and coercive process that became source of Ethiopia's political agony in the last century. The paradoxes inherent in this process are well known ranging from those who think it was a normal process of nation building¹²⁸ to those who think it was an empire building and part of colonialism.¹²⁹ In between the two extremes one finds those who advocate for a new social contract that allows for a more inclusive center and genuine self-rule be it in the form of a federation or confederation.¹³⁰ The new equivalent that advocates for the return to the old nation building era is Abiy's '*Medemer*.' *Medemer* is claimed to be the political ideology of PP designed by Prime Minister Abiy Ahmed that he published in September 2019.¹³¹ 'It glorifies Ethiopia's past, criticizes EPRDF era federalism for promoting ethnic divisions, and imagines a very centralized integrated Ethiopian state and national identity.'¹³² Dereje wrote, 'Abiy—keen to distance himself from the EPRDF's ethnic federalism—invoked unity and national integration in his politics of national unity, referring to Ethiopia's 'glorious' past in speeches made at home and among the diaspora... In 2020, Abiy converted Emperor Menelik II's former palace grounds into a public park and museum called 'Unity Park.'¹³³ Besides, recently issued government sponsored study claims that the most controversial clauses of the constitution that aim to empower ethno national groups have to be amended hinting a possible shift towards 'geographic federalism.'¹³⁴

¹²⁷ See <https://www.youtube.com/watch?v=WZzcXrHngV4&t=1759s>.

¹²⁸ See for details Levine (n 81).

¹²⁹ Assefa Jaleta, *Oromo Nationalism and Ethiopian Ethnocratic Politics, Horn of Africa* 20 (2002): 11–45.

¹³⁰ Merera Gudina, *Ethiopia: Competing Ethnic Nationalism and the Quest for Democracy, 1960–2000* (Shaker Publishing, 2003).

¹³¹ Abiy Ahmed, *Medemer* (Tsehai Publishers, 2019).

¹³² Milkessa Gemechu, 'Ethiopia: Federalism, Party Merger and Conflicts,' *Conflict Studies Quarterly* 42 (2023): 35.

¹³³ Dereje Feyissa, *Epistemological Debates and Ideological Fault lines in Ethiopia*, Rift Valley Institute (April 2023).

¹³⁴ See a research Report entitled 'FDRE Constitution after Three Decades: Inquiry into Whether and What to Amend' *Policy Study Institute*, Addis Ababa, October 2022.

PP has declared that the Ethiopian people as its social basis, not the ‘nations, nationalities and peoples’ as declared in the constitution. PP as well advocates ‘Ethiopia-first nationalism,’ which competes with liberation movements’ ethno-nationalism. Ethiopia-first nationalism was an official party-state ideology during the Derg (1974–1991), now recycled in a new form under PP. Observing this developments and subsequent to the Pretoria Peace deal signed early November 2022 that promised to end the war between the Federal Government and the TPLF some wrote, the agreement signals ‘turning point making the end of...ethno nationalism’s hegemonic centrality to national politics.’¹³⁵ Hence the critique as aptly explained by Trueman the ‘imperial narrative is being recycled’ in a new form through Abiy.¹³⁶ This is not surprising. Abiy’s victory speech in Parliament in April 2018 included the line ‘God rest the soul of my mother who told me as a young boy that I will be Ethiopia’s seventh King.’¹³⁷ There is no federalism under authoritarian and centrist king.

This new trend was partly tempered following the intra party crisis and power struggle between the ADP and ODP wings of PP in mid-2022. Abiy dismissed senior members of ADP such as Gedu Andargachew who co-founded the ODP-ADP alliance.¹³⁸ The ADP and Amhara elite played predominant role backing Abiy in full swing in his destructive war in Tigray. Not to mention that the same elite’s narrative constituted and served as the predominant pro government mobilization ideology during

¹³⁵ Fana Gebresenbet and Yonas Tariku, ‘The Pretoria Agreement: Mere Cessation of Hostilities or Heralding a New Era in Ethiopia? *Review of African Political Economy*’ (2023): 3–4. Their position does not sound valid through. The agreement requires a return to the pre-war era and that is an endorsement of the constitution that empowers ethno national groups at least on paper.

¹³⁶ Trevor Trueman, *An Imperial Narrative Gets Recycled*, available at <https://www.ethiopia-insight.com/2020/08/24/an-imperial-narrative-gets-recycled/>, August 24, 2020.

¹³⁷ See his speech at <https://www.youtube.com/watch?v=9RO6D6xPZak> as accessed September 9, 2020.

¹³⁸ The ODP-ADP coalition was united by its hatred towards TPLF and Tigray in general than by any political ideology. In fact both have contradictory visions. Oromo elites such as those in OFC and OLF are inclined towards confederation while the hard core Amhara elite wants to end ethnic federalism and shift towards geographic federalism. Compare Dawits remark with Bahar’s in the following links. See for instance Dawit Woldegiorgis, ‘Ethiopia needs a new constitution’, Ethiopia Observer, 21 January 2019. www.ethiopiaobserver.com/2019/01/21/ethiopia-needs-a-new-constitution-dawit-wolde-giorgis/; Bahar Oumer, ‘The Prosperity Party is a threat to multinational federalism’, Awash Post, November 8, 2020. www.awashpost.com/2020/11/08/the-prosperity-party-is-a-threat-to-multinational-federalism/.

the war. ADP may have had plans to control federal power outsmarting ODP but the latter took preemptive measures. ODP dislodged ADP and decided to liquidate the Amhara special police (a force that committed ethnic cleansing in western Tigray along side the regime's army and Eritrean forces during the Tigray war) that triggered the latest war in the Amhara region. It does seem therefore that power has shifted from the ADP-ODP coalition towards narrow circles of ODP. It is yet to be seen what this shift means but two divergent perspectives are emerging. One version as already noted argues the era of ethno nationalism has come to end. Abiy as champion of Ethiopia's unity and territorial integrity has won over such forces that dominated the political discourse since 1960s. Dereje on the other hand argues that the Pretoria Peace deal and the recent war going on in the Amhara region show Abiy's ideological shift in favor of ethno nationalism, a political vocabulary that he dissociated himself from during the first two years of his term.¹³⁹ While the later view might coincide with ODP's increasingly hegemonic role in the country, it is no proof that the regime has shifted towards an accommodative approach (more on this later). PP has not made substantive shift but only a tactical one. PP's authoritarian and violent features remain unchanged and the crisis in Oromia and the Amhara regions do not in any way show its shift towards accommodation. ODP may have within its circles strong federalist and accommodative elements but they are no match to Abiy's centralizing drive and they have failed to counter him so far. In fact PP continues to narrow down its social base following its repressive measures in different parts of the country and lately against ADP and the Amhara region more broadly and it is likely that in such circumstances it will remain more authoritarian and violent than before to consolidate its power.

Reinforcing the centralization trend is the transformation of the EPRDF to PP under Abiy that turned former relatively autonomous eight coalition and affiliate members of the EPRDF into branches. The party's internal rule provides that members of PP in regional states are branches of the central leadership in Addis Ababa, no longer autonomous units as they were before.¹⁴⁰ Because the party is fused to the state at both

¹³⁹ Dereje (n 133): 128: 27.

¹⁴⁰ Bekele Erko, "Regional Prosperity Party Leaders Need to Regain Autonomy—And Rescue Ethiopian Democracy," Ethiopia Insight (September 11, 2020), <https://www.ethiopia-insight.com/2020/09/11/regional-prosperity-party-leaders-need-to-regain-autonomy-and-rescue-ethiopian-democracy/>

federal and regional levels in Ethiopia, the political action of merging (some say nationalizing) regional parties into PP as national party resulted in direct central control of regional states through the branches.¹⁴¹ Applied in a federal context this means that regional states are *branches*, not autonomous bodies. Thus, since the establishment of PP, Ethiopia is effectively now a unitary decentralized state, not a federation. This remains a puzzle because the constitution has not been amended. One should look into the forces that brought Abiy to power to capture the risks of this development. He came through ODP and it is well known that the core content of the protests in Oromia was ‘we need a genuine federation, more self-rule, stop federal government intervention in states.’ In other words, it was a demand for more, not less autonomy. It is an irony then that Abiy is keen to centralise power contrary to his own social base. As the process of nationalizing the coalition and affiliate parties lacked consensus and was conducted in haste, the TPLF as a historically regionally oriented party saw this development as threat to its existence aggravating relations between PP and TPLF leading to the withdrawal of the latter and subsequently to the devastating war in November 2020.

There is more evidence that shows the centralization trend. The constitution empowers regional states to establish their own police to ensure peace in their territory (Article 52). However, a recent policy document of the federal government shows that the federal government has proposed to dissolve the regional state police alleging that it is heavily militarized against its mission and is becoming a threat to peace, security.¹⁴² The document further state the special police is becoming tool for extremist ethnic and religious groups.¹⁴³ It centralizes the recruitment process of regional state police by subjecting it to federal control.¹⁴⁴ Regional state police, according to this document, is made *accountable*¹⁴⁵

¹⁴¹ Gemechu (n 132): 28.

¹⁴² See Police Standard of Ethiopia, December 2020, Addis Ababa, Policy Document, pp.78–61. Interview with expert involved with in the preparation of the document, Ministry of Peace 15 May 2021 Addis Ababa.

¹⁴³ Ibid.: 58.

¹⁴⁴ Ibid.: 71.

¹⁴⁵ Ibid. The Federal Police Commissioner General, the regional state police will be headed by Commissioner whose status is one step lower than the federal Commissioner General. It introduces a new element of the regional state police accountability to the federal level that violates the federal principle.

to the federal police while reserving the administrative accountability to the regional states.¹⁴⁶ Reversing previous trends and violating the regional state mandate, it subjects the promotion and appointment of deputy commissioner and the commissioner of regional states to be made by the federal government (Ministry of Peace).¹⁴⁷ The Education Road map issued by the federal government in May 2019 required the teaching of Amharic language in elementary schools in contradiction to the federal constitution that empowers regional states to choose their working language including the language of education.

One has to note as well that the centralization drive is limited by deinstitutionalization of the public and security sectors limiting the capacity of the state. Indeed, deinstitutionalization characterizes the new regime. The federal government has lost monopoly over the use of force and has not been able to ensure law and order throughout the country, the bare minimum role of any government.¹⁴⁸ This development has affected public trust in authorities and public institutions.¹⁴⁹ Ethiopia has more than five million internally displaced people as a result of horizontal and vertical conflicts that the government was not able to handle, one of the highest in the world.¹⁵⁰ Following an interethnic conflict between Amhara and Benishangul Gumuz deputy Prime Minister Demeke Mekonen said ‘there is no other option for residents in Metekel zone other than organizing, arming and defending themselves.’¹⁵¹ The

¹⁴⁶ Police Standard (142): 67.

¹⁴⁷ Ibid.: 47.

¹⁴⁸ Former Derg official who returned to Ethiopia following Abiy’s amnesty and who initially advised the PM to scrap the existing constitution and start fresh transition said ‘Ethiopia under Abiy is officially a failed state,’ <https://www.bbc.com/amharic/news-47879359>, April 10, 2019.

¹⁴⁹ Fikremariam Molla Gedefaw, *For Prosperity, Ethiopia Needs Institutional Not Individual Strength*, available at <https://www.ethiopia-insight.com/2020/09/15/for-prosperity-ethiopia-needs-institutional-not-individual-strength/>, September 15, 2020.

¹⁵⁰ Ethiopia: IDP Population Movement—Emergency Plan of Action Final Report DREF n° MDRET019 <https://reliefweb.int/report/ethiopia/ethiopia-idp-population-movement-emergency-plan-action-final-report-dref-n-mdret019>, Restore Law and Order, Not at the Expense of Constitutionalism <https://addisfortune.net/columns/restore-law-and-order-not-at-the-expense-of-constitutionalism/>.

¹⁵¹ Siyanne Mekonnen, Deputy PM Recommends Arming Civilians in Metekel, Benishangul Gumuz Region as Spate of Attacks by armed men leaves dozens killed [addisstandard](https://addisstandard.com/news-deputy-pm-recommends-arming-civilians-in-metekel-benishangul-gumuz-region-as-spate-of-attacks-by-armed-men-leaves-dozens-killed/), <https://addisstandard.com/news-deputy-pm-recommends-arming-civilians-in-metekel-benishangul-gumuz-region-as-spate-of-attacks-by-armed-men-leaves-dozens-killed/>, October 14, 2020.

federal government has let the proliferation of informal forces such as *Fano*, *Qeerro* and regional state Special Forces that continue to threaten it. Indeed the main obstacle to federalism and self-government remains the regime's determination and insistence to use violence to address political demands. PP era federalism is characterized by the deinstitutionalization of the security sector and failure of public institutions to provide impartial services. There is also increased perception that such public institutions are serving factional interests. Despite establishment of the special police in 2007 in the Somali region, the special police's dramatic increase in size and active engagement in interregional conflicts is linked with the crisis in the ruling party that took special shape in 2015.¹⁵² There is an emerging consensus among experts that show the strong link between the massive proliferation of the regional state police both in terms of size, weapons and frequency and the split, rupture and mistrust within the party that also coincides with the protests that began in 2015. Rene Lefort wrote 'the regional states have pursued militarization ... when rifts inside the EPRDF moved the country into the unknown.'¹⁵³ The rupture within EPRDF, internal power struggle and the wide spread protests can be taken as water shade in this regard. The rupture and mistrust within EPRDF led to claims and counter claims both vertical and among regional states.

Whether the Oromia-Somali regional state conflicts, the Amhara-Tigray contestations, vertical conflicts and wars (such as federal government and Tigray and federal government and Amhara) or the Afar-Somali disputes, the federal government often sends its army and imposed martial law to deal with political questions. Force and coercion have become the only means of communication and the order of the day. In other words, force and coercion is the means to fundamentally alter the political order and thus control over the army and security institutions becomes critical target.¹⁵⁴ It is politics by other means and the result is that the institutions of federalism have become dysfunctional and tools for promoting factional

¹⁵² For details on this see Assefa Fiseha, 'Federalism and Security: The Special Police in Ethiopia,' *Journal of Autonomy and Security Studies* 6:2 (2022): 96–130.

¹⁵³ Rene Lefort, 'Ethiopia's war in Tigray is 'but the tip of the iceberg when it comes to conflicts ravaging the country,' The Africa Report <https://www.theafricareport.com/84350/ethiopias-war-in-tigray-is-but-the-tip-of-the-iceberg-when-it-comes-to-conflicts-ravaging-the-country/>, April 30, 2021.

¹⁵⁴ Assefa (n 152): 96–130.

interests thereby losing their legitimacy. Federal institutions are supposed to mediate impartially in disputes between regional states. Amhara has claim over Tigray's territory and at the height of the war in 2021, Prime Minister, Abiy said, 'Wolkayit and Tselemti (the disputed territories) have always been part of *Begemidir* (the old name of Gondar).' The federal army was thus given a green light to side with the Amhara region and thereby reduced to be an agent of the Amhara elite, not any more impartial Ethiopia's defense force.¹⁵⁵ Same issue emerged when PP put the Amhara region under emergency in 2023. Control over force, in the absence of functioning institutions or weak institutions controlled by factional interests is thus a survival issue for those that have lost faith and trust in federal institutions. All the more, those promoting factional interests aim to control force to dominate and impose their factional interests and deadly violence is the outcome. What this implies is politics has been *militarized* in Ethiopia. It also shifts the role of the army and security that is primarily designed to ensure the territorial integrity of the country against external aggression.

The military and the security apparatus has become an instrument of PP as it is hijacked by factional interests in violation of basic constitutional principles. For example, Article 87(4) of the Ethiopian constitution states 'The armed forces shall carry out their functions free of any partisanship to any political organization.' The moment the army is deployed in domestic affairs when the leadership fails to provide a political solution

¹⁵⁵ See his speech July 1, 2021 speech <https://www.youtube.com/watch?v=sJPw2EwNh4>; according to an expert, an analysis of 32 old maps starting from the early 18th C., all the way to mid-twentieth century show 'Welkait is explicitly included within a larger Tigray confederation (periods 1707–1789; 1841–1886; and 1939–1941); it is briefly mapped as part of Amhara in 1891–1894 and part of Gondar from 1944 to 1990. At other periods it appears independent or part of a larger Mezaga ("dark earth") region. The Amhara/Gondar—Tigray border is mapped on the Tekeze River at short intervals in 1844–1847 and 1891–1894 and then more permanently between 1944 and 1990. The meta-analysis of the historical maps shows that for the larger part of the last 300 years or more, Western Tigray has been under Tigray jurisdiction, with a border running along or across the *Simien* massif. However, at times of upheaval, the territory has been briefly reorganized under either the Amhara politics or was autonomous' J. Nyssen, 2022a. Dataset: Western Tigray in 101 historical and 18 ethno-linguistic maps (1607–2009). Version 2. Ghent (Belgium): Ghent University, Department of Geography. Zenodo, 2022 p. <https://doi.org/10.5281/zenodo.6554937>; see also Michael Russel, *Nubia and Abyssinia* (New York: J. and J. Harper, 1833): 79; Samuel Gobat, *Journal of Three Years' Residence in Abyssinia* (New York: M. W. Dodd, 1850): 42–43.

to emerging issues and imposes factional interests, it loses its impartiality. Thus politics has to be returned back to the political table through dialogue and political settlement if anyone is to reduce/control the proliferation of command posts, the use of special police and other informal forces. A perception of partiality against federal institutions, the army and security means that one of the conflicting parties will resort to self-defense anticipating that there is no impartial solution to the conflict.¹⁵⁶ Thus a failure to provide an impartial political solution to local conflicts by federal institutions fuels the engagement of the special police as the special police is emerging as a regional state defense force. At the root of the crisis is thus the lack of political solution to local conflicts by relevant institutions. Parties to conflict as a result resort to violence as a means to achieve their goal and the consequence is grave human right violation, ethnic cleansing and millions of internally displaced people.

As a result of war and the growing impact of informal forces, the federal government has lost physical control of parts of Oromia, Benishangul Gumuz, Amhara and Tigray at least during the war. The Ethiopian state is thus contracting and shrinking. This state of fact speaks volumes about the state of affairs in Ethiopia. A former official Dawit W. Giorgis wrote Ethiopia under Abiy is officially a failed state by all indicators.¹⁵⁷ Thus alongside the drive for centralization, there is also deinstitutionalization and fragmentation.

It should be mentioned that in addition to the sham nature of the federations, it was the effort to centralize by the ruling elite that triggered the failure of the former USSR and Yugoslav federations.¹⁵⁸ There is thus a worrying parallel in Ethiopia at present: the more PP tries to centralize and imposes military rule, the more it triggers ethno nationalism and with it comes threats of fragmentation. It is this worrying trend that we have labelled as the rise of a new centrist authoritarianism. The war that broke out between the federal government and Tigray early November 2020 is partly related to the divergent perspectives about the

¹⁵⁶ Ann M. Fitz-Gerald, *Ethiopia's Security Dilemmas*, available at <https://rusi.org/commentary/ethiopias-security-dilemmas> 18 July 2019 as accessed on 3 May, 2021.

¹⁵⁷ Dawit Woldegiorgis, *Ethiopia: On the Brinks*, available at <https://borkena.com/2019/04/10/ethiopia-a-country-on-the-brinks-by-dawit-woldegiorgis/>, accessed April 10, 2019.

¹⁵⁸ John McGarry and Brendan O'Leary, 'Must Pluri-National Federations Fail?' *Ethnopolitics* 8:1 (2009): 11.

federal system: Abiy trying to restore centralized Ethiopia and TPLF now pushing for a confederate type of arrangement that grants more autonomy than envisaged in the constitution.¹⁵⁹ Tigray has been at the fore front of the struggle for self-government and yet Abiy is running a federation without Tigray. The current federal institutions have little or no representatives from Tigray. The House of Peoples Representatives and the House of Federation have no representative from Tigray. The federal army and federal police have officially expelled nearly all members from Tigray.¹⁶⁰ Many of the ethno national based forces share TPLF's agenda of genuine self-government and a more inclusive center.

The tension between those pushing for more integrated Ethiopia and the ethno national based forces is not necessarily incompatible. From the centrist elite's perspective, greedy political ambitions and extremism aside, maintaining the unity of the country, social cohesion and country wide protection of citizenship rights remain a top priority. This is understandable. The Amhara elite accompanied by the Guraghe and a section of the Oromo were key players starting from Menelik's project of nation building all the way to the last century. Liberal clauses of the constitution and enforcement of such basic rights and freedoms using independent judiciary along with a constitutional court that serves as a guardian of the constitution, institutional protection of intra-unit minorities through representation and local empowerment can address their concerns. Ethno-national forces crave for genuine self-government free from interference of the federal government (be it party channel or otherwise) and inclusion at the federal level. They suspect whoever controls the center often tends to centralize power and resources. They are pushing for transfer of power and resources to the states, reform the HoF to have a law making power and ensure equal representation of states, equal or proportional representation of regional states in the federal executive, consensus based decision making on key political and economic issues, and genuine autonomy to regional states. These reforms will go a long way in addressing such concerns. The interests of both camps are not necessarily incompatible and can be subject to negotiation. The revision of the constitution could thus be made once a dialogue addresses the outstanding issues. Political

¹⁵⁹ Young (n 87): 55.

¹⁶⁰ Ann M. Fitz-Gerald, *Ethiopia's Security Dilemmas*, available at <https://rusi.org/commentary/ethiopias-security-dilemmas>, July 18, 2019 as accessed on 3 May, 2021.

agreements are formalized through a constitutional pact where all actors agree to abide by. Free and fair elections will then follow as a means to hand over power to an elected government.

The above developments show the difficulties related to federalism in the country. Federalism is inherently about a peaceful on going bargaining and negotiation between centripetal (unity) and centrifugal forces (diversity). Federalism takes a 'system of negotiated political accommodation' as *norm* and rules out violence.¹⁶¹ Success in federalism implies absence of war and violence. Threats of secession as in Quebec and Scotland do not wither away but institutionalized federal bargain provides an avenue for a compromise. In Ethiopia, negotiated political accommodation is replaced by violence. Federalism has not failed but has been *betrayed* both in the past and present from serving as a venue for intergovernmental bargain and negotiated reform.

4.3.2.5 *New States in the South*

One of the post-EPRDF developments is the rise of new regional states largely following from the breakup of the former Southern regional states. The constitution enumerates and names the number of constituent units in Ethiopia (Article 47). It also sets the procedures required to establish a new regional state under Article 47(2). It provides,

- a. When the demand for statehood has been approved by a two-thirds majority of the members of the Council of the Nation, Nationality or People concerned, and the demand is presented in writing to the State Council;
- b. When the Council that received the demand has organized a referendum within one year to be held in the Nation, Nationality or People that made the demand;
- c. When the demand for statehood is supported by a majority vote in the referendum;
- d. When the State Council will have transferred its powers to the Nation, Nationality or People that made the demand;

¹⁶¹ Thomas Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Inquiry* (Toronto: University of Toronto Press, 2015): 4.

In short, establishing a new regional state requires two-third majority vote of the local council that represents the particular community which then has to be submitted to the regional state council that has to organize a referendum within a year following the request and the particular community votes by a majority for a new regional state in a referendum. Ethiopia is very diverse and the second most populous country in Africa and certainly nine states are not enough to ensure the principle of self-government, one of the pillars of the constitution. As a result, there have been demands for new constituent units. The ruling party (EPRDF) was however very reluctant to concede to such demands as its major focus has been on economic growth and not on political reforms. Following the winds of change that resulted in the election of Abiy Ahmed in 2018, the Southern Nations, Nationalities and Peoples Regional State (SNNPR) faced mounting challenges related to demands for self-government.

The SNNPR is distinct because it hosts some fifty six different groups compared to other regional states that are dominated by a particular ethno national group. As part of asserting new found autonomy, different sub units in the SNNPR threatened the Southern member Coalition of the ruling party. During the transition period (1991–1994), the fifty six ethno national groups were organized in five states before they merged together to form what became the SNNPR in 1995. The then political leaders of Ethiopia used ‘carrot and stick’ to end the five states and form one. On one hand ethno national groups such as the Sidama and Wolayta have long standing claims for self-rule and thus continue to demand their own regional state.¹⁶² On the other hand providing self-rule to fifty six different groups (some of them with only a few thousand people) was a night mare for the ruling party. Nor were there enough experts and resources to run the government given that it was a new federation. Instead of too many small states, the leaders wanted a relatively bigger state with possible self-rule arrangements at local level (zones and special weredas). To achieve this complex objective of making happy the relatively bigger ones and keep the South as one, the ruling party reserved key positions for the Sidama and Wolayta (second influential group in the South- former PM Haile Mariam’s ethnic base) and created some 20 ethnic based local governments meant to replicate the regional states with

¹⁶² See for details Shiferaw Muleta, *Chronicles of Sidama People’s Struggle for Self-rule*, *Addis Standard* (Special Issue) <http://addisstandard.com/special-edition-chronicles-of-sidama-peoples-struggle-for-self-rule/> May 30, 201.

elected councils, executive and judicial powers. The whole process was not necessarily consensus based but certainly the elite from the south was fairly involved. The ruling party also tried to keep balance between the two bigger groups—if Sidama becomes party chair/regional state president, then Wolayta becomes deputy party and deputy regional state president or vice versa. This worked fairly well in a tight party system. Some used to call the South as a *federation within a federation* and the regional state was fairly peaceful and was able to build many small cities at zonal level much better than other regional states.

Two factors in 2018 however triggered to challenge this complex arrangement. Political liberalization and power struggle. With the coming to power of Abiy Ahmed and his promise to democratize Ethiopia, unhappy political elites in the south wanted to have their own regional states instead of staying under one regional state. The fragmentation within the ruling party was considered as perfect time to assert new found autonomy and freedom and thus eleven local governments decided to have their own state. They followed the constitutional procedures and applied to the regional state council and relevant federal authorities (the National Electoral Board of Ethiopia-NEBE and the HoF) for regional statehood.¹⁶³

Second factor was power struggle between Shiferaw Shigute (Sidama and former deputy chair of the party) and Haile Mariam Desalegn (former PM from Wolayta). In the bid to elect the new PM following resignation of Hailemariam at the height of the political crisis in 2017 and early 2018, EPRDF was divided.¹⁶⁴ Some coalition members wanted a PM from ODP (Abiy Ahmed), while others wanted Shiferaw Shigute from the South. When Abiy was elected by majority vote, Shiferaw was surely unhappy and wanted to deliver at local level while surly knowing he will not survive the political wave. Shiferaw who knew very well how the Southern state operated, informed the Sidama elite to trigger application for regional statehood at the local level. He was previously blamed for long by his own ethnic group for suppressing an age old demand for regional state hood and he thought it is perfect time to pay back. He knew very well as well if Sidama starts the claim, others will follow the

¹⁶³ See Biruk Abdu, Claims for regional statehood in the South and the position of the Southern Coalition The Reporter (Amharic), 11 September 2019, <https://www.ethiopianreporter.com/index.php/article/16729>.

¹⁶⁴ Interview with a member of the SNNPR Council in Hawassa, November 15, 2018.

same which may mean the end of the South as a regional state and emergence of many new regional states. That is exactly what happened: the Sidama requested for statehood, then the Wolayta and nine others did the same.

The federal government and the new leaders of the Southern coalition did not know what to do as the pace of the change was too fast and was done at a time when the government promised 'political freedom and transition to democracy.' Yet except the Sidama case which made it all the way to NEBE, the ten other demands were withheld by the party and were never tabled to the SNNPR council as required by the federal and regional state constitutions. Even the Sidama case did not go as planned. The federal government and NEBE busy undergoing political reforms failed to respond within a year that was due by the end of July 2019. Unhappy with the situation Sidama youth (*Ejjotte*) working in cooperation with the Sidama elite in the regional state chose to declare regional state hood on their own and indicated mid-July 2019 as dead line. The local political elite mobilized the youth and the entire local population declaring its readiness for de facto regional state hood by mid July 2019. Yet there were so many other outstanding issues that needed to be addressed and remained unresolved: the status of the capital Hawassa that is multiethnic and where the federal government and the regional state have invested a lot in the last 28 years; border tensions that may erupt when the Sidama exercise statehood (with Wolayta and Oromia); rights of minorities in the new Sidama regional state etc.

When the local political elite mobilized itself in a bid to declare the new regional statehood by mid July 2019, the Southern party and the federal government were under panic. They have not made any preparations for the possible consequences. There was no real engagement for political solution. NEBE as well was under reform and did not have the necessary institutional preparation to decide. The result was a deadlock: local youth and Sidama elite eying for statehood and Southern party and federal government under panic. At the last hour, NEBE made a decision following the appointment of the full board saying it can only facilitate the demand for statehood in November 2019. Local political elite lost patience and began protests. Federal government sent the federal army to stop and clashes between the two caused death and destruction to property. The Southern state was put under military command and emergency. NEBE finally declared the day for a referendum and the result was an

overwhelming support for a new state and the Sidama emerged as tenth state in June 2020.

Another new state (the South West) soon joined following the procedures set in the federal and SNNPR constitution as an eleventh state in 2021.¹⁶⁵ The Southwest state is in itself very diverse in terms of ethnic composition and is the result of an happy compromise among the different groups. The main drive for granting statehood was however related to inconvenience. It was too far to be administered from the SNNPR capital Hawassa and despite enormous potential for growth, it remained a hot spot for various kinds of conflicts and the regional state was too far to provide much needed political solution. Two more states (the South and Central Ethiopia) were established in 2023.

As a result of the birth of two new states from the SNNPR, the number of states in Ethiopia has increased from nine to thirteen. Nevertheless, the federal constitution's article 46 that enumerates the number of states as nine has not been amended to add the two new states. Neither the federal nor the SNNPR regional state showed any effort to amend the constitution (Article 47) to incorporate the new states.

The emergence of two new states (Sidama and South West) has not ended the demand for more states in the SNNPR. Several of the zones and special weredas in SNNPR have requested for regional state hood and have complied with the procedures stipulated under Article 47, albeit with the exception of the Sidama, the term of office of the local councils that have made the requests expired in 2021.¹⁶⁶ At first the regional

¹⁶⁵ Kaffa, Sheka, Bench Sheko, Dawuro and West Omo Zones, and Konta Special woreda are now part of the new South West State. Ethiopia gets eleventh state with more than 96% approval for South West referendum Addis Standard <https://addisstandard.com/news-alert-ethiopia-gets-eleventh-state-with-more-than-96-approval-for-south-west-referendum/#:~:text=Addis%20Abeba%2C%20October%209%2F2021,Zones%2C%20as%20well%20as%20Konta> October 9, 2021.

¹⁶⁶ The Konso, Gedeo, Gamo, Gofa, South Omo, and Wolayta zones as well as the local council members of five special Woredas, namely Amaro, Ale, Basketo, Burji and Derashe have voted to restructure their administrative units into a newly organized regional state. Wolayta, Gamo, Gofa and the diverse communities in South Omo were 'clustered' as one state denying age old demand by Wolayta for their own state. Another 'cluster' state emerged for the Gurage, Hadiya, Halaba, Kembata Tmbaro and Silte zones, as well as the Yem Special Woreda that have voted to restructure their respective administrative units to form another new regional state. This is irony because in the early 1990s an effort to establish a state inhabited by Wolayta, Gamo, Gofa and Dawro under the rubric of WoGoGoDa was rejected and one of the states simply brings that project back to life. See

state Council was not willing to take further steps once the Sidama and South West cases were settled. Experts indicate the ruling party was not willing to see the proliferation of new states and had blocked the Council from making the decisions needed to facilitate referendum.¹⁶⁷ After facing mounting pressure, the ruling party conceded to some demands albeit partially as in most cases the response does not align with the demands. The ruling party resorted to what it calls ‘clusters’ (replica of the SNNPR model in a small scale and in a new form) instead of addressing the demand for self-government by ethno national groups as promised in the constitution. Except the Sidama, all three new states are inhabited by diverse groups and ‘clustering’ does not address the demand for self-government by ethno national groups. The party thus in one way or another continues to backtrack with its promises. As in the Sidama and South west case, the federal constitution that lists and names the number of states as nine has not been amended. As a matter of fact we have thirteen states but as a matter of the constitution only nine. As already noted in previous sections, the ruling party has control over federal and regional state elected bodies and thus the failure to comply is not because it lacks a majority but disregard to constitutional principles, procedures and constitutionalism.

4.3.3 *South Africa*

The political and constitutional developments in South Africa in the early 1990s are so remarkable. For many observers it was considered an intractable conflict difficult to resolve given the risks associated with democratizing white minority rule: ‘world on fire’ was the possible consequence as articulated by Amy Chua.¹⁶⁸ Yet, shifting global power politics and the end of the Cold War put the apartheid regime of South Africa in a shaky position creating favourable condition for political settlement with the African National Congress (ANC). The then ruling party (the

Data Dea, ‘Enduring Issues in State-Society in Ethiopia: A Case Study of the WoGaGoDa Conflict in Wolaita Southern Ethiopia,’ *International Journal of Ethiopian Studies* 2:1/2 (2005/2006): 141–159.

¹⁶⁷ Wolayta, Hadiya, Guraghe, Silte are some of the zones that have demanded regional statehood. Interview made in Hawassa May 15, 2021.

¹⁶⁸ Amy Chua, *World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability* (New York: Doubleday, 2004).

National Party and the then President of the country F. W. De Klerk lifted the ban on the ANC, released Nelson Mandela and set the stage for a transition. The presence of a charismatic and self-less leader, Nelson Mandela, who was willing to move beyond the past and contain the potentially violent sides of Black Nationalism, in return for black political empowerment, was also a factor in South Africa's political transformation. White minority rule and the idea of black majority of roughly 80% (despite enormous internal diversity among the language based groups)¹⁶⁹ articulated by the ANC as well as a middle class¹⁷⁰ moderated the possibility of emergence of ethno national based liberation forces. To be sure, the Inkatha Freedom Party (IFP), the Zulu nationalist movement that struggled for autonomy of KwaZulu-Natal, and the Afrikaner white minority (Afrikaner *Volkstaat* –people's state in an own territory) tried to mobilize along identity in the negotiations (1993–1996).¹⁷¹ But the white minority represented by the National Party that dominated power for long (1910–1990) ensured that whites controlled 87% of the country's land mass, while putting South African blacks in enclaves and controlled areas denying them access to power and the economy—Bantustans. The whites are territorially dispersed¹⁷² and not concentrated in one province.¹⁷³ Yet the National Party insisted on the federal option, judicially enforced constitutionally entrenched bill of rights and job security as a safeguard against the emerging black majority rule. For the IFP, its

¹⁶⁹ isiXhosa 18%, Zulu 23.8%, Sepedi 9.1%, Setswana 8%, Sesotho 7.6, Xitsonga 4.5%, Afrikaans 13.5%, North Sotho 9.1%, siSwati 3%, Tshivenda 2.3%, isiNdebele 1.5%, English 9%, others 0.6%. If race is considered as frame of analysis, South Africa has clear black majority against white minority. If language becomes the unit of analysis, however, South Africa is a country of minorities. Murray and Simeon (n 35): 416.

¹⁷⁰ Trade unions and black middle class serve as the glue overriding ethno nationalism and language based mobilization—Murray and Simeon (n 35): 416.

¹⁷¹ IFP was not without reasons for the identity based mobilization. The ANC leadership was at some stage perceived as Xhosa dominated (Nelson Mandela, Thabo Mbeki, Oliver Thambo, Walter Sisulu were Xhosa). Yonatan Tesfaye, *Ethnic Diversity and Federalism: Constitution Making in South Africa and Ethiopia* (Farnham: Ashgate, 2010): 73.

¹⁷² Nico Steytler, 'The Withering Away of Politically Salient Territorial Cleavage in South Africa and the Emergence of Watermark Ethnic Federalism,' in George Anderson and Sujit Choudhry eds., *Territory and Power in Constitutional Transitions* (Oxford: Oxford University Press, 2019): 223.

¹⁷³ NP enjoys regional majority in Western Cape and the Northern Cape if supported by 'colored' votes which later led to Democratic Alliance electoral win in Western Cape,

province is dominantly a Zulu inhabited one (80%) and initially demanded federalism and devolution of power to provinces as well as recognition of Zulu Monarchy but over the years, the ANC has become more popular securing in the 2014 election 64.5% of the votes, while IFP received only 10.9%.¹⁷⁴ Thus while managing IFP and the white minority may have been part of the constitutional transition and reasons for constitutionalization of devolution, owing to the dispersed nature of the white minority and ANC's dominance in KwaZulu-Natal- the Zulu dominated province, the role of devolution of power to provinces and local governments slowly shifted from ethnic accommodation to ensuring development and service delivery as dominant features of the system.

In this respect identity based political mobilization is more diffused in South Africa,¹⁷⁵ compared to the three African federations. As Steytler argued 'after twenty five years, the unmaking of the salience of territorial cleavages has largely been successful: territorial politics based on race and ethnicity have largely withered away...the demand for ethnic homeland has evaporated.'¹⁷⁶ As Murray and Simeon also argue the constitutional design in South Africa aimed at blurring, and diffusing diversity.¹⁷⁷ The institutional design process was inspired by Horowitz's integration model.¹⁷⁸ A key feature of the design as argued by Murray and Simeon is '*recognition of diversity without empowering it*'¹⁷⁹ that assumes the fluid nature of identity politics in the country. As a result, '[i]dentity politics has

the only province which is not under ANC rule. Right wing Afrikaner claim for self-determination lost meaning as there is no identifiable area they could get substantial support, Steytler (n 172): 231.

¹⁷⁴ Ibid.: 231–232.

¹⁷⁵ Murray and Simeon (n 35): 410. Yet with declining economy (thin middle class), withering away of white minority rule (common threat) and weakening of the ANC (it continues to lose local elections), cleavages can resurface in South Africa: black majority can disintegrate into ethnic movements unless the current alarming inequality is addressed.

¹⁷⁶ Steytler (n 172): 219.

¹⁷⁷ Murray and Simeon (n 35): 411.

¹⁷⁸ Donald Horowitz (n 54).

¹⁷⁹ Murray and Simeon (n 35): 411.

not disappeared in South Africa but does not dominate the political landscape.¹⁸⁰ A major factor here is of course how the ANC¹⁸¹ articulated its vision for South Africa: as champion of the black majority irrespective of linguistic and ethnic differences a united and inclusive South Africa that cuts across the main cleavages.¹⁸² With its leftist leanings, the ANC's struggle and mobilization with the black majority as its social base was class, not ethno national based.¹⁸³ To this one should add the ANC's determination to end the ten homelands out of four provinces established on ethnic lines (Bantustans)—the apartheid era ethnic enclaves (deprived of political power, economic base and land) that served to divide and rule and perpetuate white minority rule. Indeed, it is this history that made the ANC formally reject and discredit federalism in South Africa. South Africa's nine new provinces established in the constitution are largely new and officially aimed at ending the ethnic enclaves.¹⁸⁴ To this end 'race could no longer be an organizing principle,'¹⁸⁵ and provinces should not reflect ethnic-based Bantustans.¹⁸⁶ On the contrary, the ANC's preoccupation was economic development. Consequently, the provinces do not aim to empower ethno national groups. Indeed, the idea of federalism for the ANC was not a popular choice as it preferred undivided unitary state¹⁸⁷ but only conceded indirectly to address the concerns of

¹⁸⁰ Ibid.: 411.

¹⁸¹ See Susan Botha, 'South Africa's Party System,' in Murray Faure and Jan-Erik Lane eds., *South Africa: Designing New Political Institutions* (London: Sage Publication, 1996): 105–120.

¹⁸² Murray and Simeon (n 35): 418; 413.

¹⁸³ Steytler (n 172): 223.

¹⁸⁴ Murray and Simeon (n 35): 415; The provincial list include the Eastern Cape, Free State, Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga, Northern Cape, Northwest and Western Cape (Section 103 of the South African Constitution). These nine provinces replaced the four South African provinces that had existed since 1910 known by the name the Cape Province, Transvaal, Orange Free State and Natal.

¹⁸⁵ Steytler (n 172): 222. Yet, the major ethnic groups are indirectly accommodated in the provinces. The Zulu in Kwazulu/Natal (80.9% dominant); Xhosa in Western Cape (83% dominant); Sotho in Free state (64.4% dominant); Tswana in North west (65.4%); Afrikaans in Northern Cape (68%) and Western Cape (55.3%) See Bertus de Villiers, 'Creating Federal Regions-Minority Protection versus Sustainability,' *Max Planck Institute for Comparative Public Law and International Law* 72 (2012): 335.

¹⁸⁶ Steytler (n 172): 226.

¹⁸⁷ Ibid.: 222.

the white minority and IFP.¹⁸⁸ The ANC aimed to uproot the old regime and ‘viewed federalism as a device to perpetuate grand apartheid and weaken transformative central government’.¹⁸⁹ The constitutional multi-level government with national, provincial and local spheres is inspired by the German homogenous federation focusing on cooperative government.¹⁹⁰ The institutional option for dealing with diversity thus reflects this reality.

Consistent with the idea of integration schemes, policies for diffusing identity based politics are chosen within the framework of a liberal constitution¹⁹¹ that politically empowers the black majority but with important constitutional restraints to ensure the protection of *individual rights*: the bill of rights and the constitutional court as well as property rights. Black empowerment had to effectively concede the white’s retaining their economic privileges,¹⁹² an issue that continues to challenge South Africa. Thus, despite the constitution declaring South Africa as diverse—the rainbow nation (Preamble), it has no formal place for group-based rights. It stipulates ‘We the people of South Africa,’ the constitution as social contract among individual citizens. ‘The constitution does not envisage bi-nation or multination state’¹⁹³ as some whites and minorities had wished for. The constitution subscribes to the classic liberal answer as diversity is not to be entrenched or institutionalized but should be left to the private sphere, following the logic: let us separate state and ethnicity. Under chapter one, section 6 there are clauses on right to language and culture but are subject to bill of rights limitation (chapter two, section 30). Both language and culture will be addressed on an *individual basis* through a bill of rights with an equality and non-discrimination clause at its center.¹⁹⁴ The fact that English remains as lingua franca also served as a moderating factor.

Distinct from the integrationist approach, South Africa has opted for a parliamentary system of government with two chambers: National

¹⁸⁸ Murray and Simeon (n 35): 432.

¹⁸⁹ Steytler (n 172): 223.

¹⁹⁰ Murray and Simeon (n 35): 432.

¹⁹¹ Ibid.: 423.

¹⁹² Also civil service jobs and pensions. Steytler (n 172): 223.

¹⁹³ Christina and Simeon (n 35): 423.

¹⁹⁴ Steytler (n 172): 223.

Assembly that is directly elected and the National Council of Provinces composed of provincial delegates. The chief executive and head of state is named 'President of the Republic' who once elected in the National Assembly ceases to be its member and is thus not directly elected like a President in Presidential systems. The President and the cabinet can also be impeached in parliament through the motion of no confidence (Section 87 and 92 of the Constitution).

South Africa has also adopted proportional electoral system (Section 46) for the National Assembly more along the accommodationist approach. Parties that would not be elected under the First Past the Post are able to secure seats in the National Assembly giving life to multiparty system in parliament. In recent elections, small parties have been able to win elections in local governments (Johannesburg, Pretoria) eroding ANC's strong hold in bigger cities. The electoral system thus promotes inclusivity and is a factor in moderating cleavages.

The contestations between the ANC (that favoured strong center and local government) on one hand and the National Party and IFP (that favored strong provinces) on the other during the negotiations and the process of constitution making resulted in what some call 'an hour-glass' system of multilevel government with strong national and local government and weak provinces.¹⁹⁵ The design reflects the shift of power in favor of the ANC. The national government enjoys an open ended power, uncommon in many federal constitutions. It has mandate over any matter not listed in the constitution as a provincial or local competence. It also has concurrent competence with the provincial mandates over most of the latter's functions.

Schedules 4 and 5 of the South African constitution enumerate provincial powers. Schedule 4 provides for concurrent mandates such as education, health, environment, housing, trade and the trend shows that national government has chosen to occupy these fields both by issuing policy and law with provincial role limited to implementation of national laws. Schedule 5 enumerates exclusive provincial powers that include abattoirs, ambulances, provincial archives, provincial libraries, provincial cultural matters, museums and veterinary services, provincial planning,

¹⁹⁵ Jaap de Visser, Annette May, 'Functions and Powers of South Africa's Provinces and Municipalities,' in Nico Steytler and Yash Ghai eds., *Kenya-South Africa Dialogue on Devolution* (Claremont, Juta, 2015): 156.

roads and traffics. The list indicates that most of the substantive socio-economic sector is either national or concurrent with provinces having limited or no role.¹⁹⁶ Besides section 44 of the Constitution empowers the national government to legislate even in those powers considered as *exclusively* provincial mandates (Section 44). This makes exclusive power meaning less but explains the integrated nature of the three spheres as interlocked to one another. It also shows the reach of the national government mandates. The fact that national government can intervene in provincial mandates and provinces can intervene in local government mandates have created the impression on some experts to state that South Africa is not a federation but a unitary state with decentralized features,¹⁹⁷ or is a federation governed as if it is a unitary state.¹⁹⁸ Powell's characterization of the South African system seems closer to the reality, owing to the centralized and integrated nature it resembles devolution than classic federalism.¹⁹⁹

Overall, in line with the goal of integrationist or centripetal federations it aims to divide power both horizontally and vertically to minimize majority tyranny and not to empower ethno national groups. By design, the constitution establishes a strong national government with a dominant role and weaker nine provinces that have limited legislative power.²⁰⁰ National government can intervene in provincial affairs that is further reinforced by the dominant role of the ANC in all spheres of government until recently. The ANC controls the National Government and eight of the nine provinces. Murray and Simeon conclude that the 'primary virtue' of South Africa's multilevel government '*may lie less in its capacity to empower than in its delegation of much responsibility for service delivery to the provincial and local governments...*'²⁰¹

¹⁹⁶ Ibid.: 163.

¹⁹⁷ Christina Murray 'Republic of South Africa,' in Katy Le Roy and Cheryl Saunders eds., *Global Dialogue on Federalism: Legislative, Executive and Judicial Governance in Federal Countries* (Montreal and Kingston, McGill-Queen's University Press, 2006): 259.

¹⁹⁸ Martin van Staden, 'The Potential for Constitutional Devolution in South Africa,' *CATO Journal* 41:3 (2021): 700.

¹⁹⁹ Derek Powell, *Transition to Cooperative Federalism: the South African Experience* (Forum of Federations, Occasional Paper Series, 2010).

²⁰⁰ Yonatan (n 171): 121.

²⁰¹ Christina and Simeon (n 35): 434.

Decades after the constitutionalization of devolution in South Africa, experts from different camps seem to agree that ensuring development and efficient service delivery has not been achieved. One-fourth of 257 municipal local governments are dysfunctional and not able to deliver services. More than fifty percent of the municipal local governments are bankrupt. The main infrastructures such as electricity and water have not been expanded although the country's population size has increased significantly. South Africa has the highest level of societal inequality in the world with 85% of black South Africans living in poverty while 87% of the white in the middle and upper class category; crimes and violence are on the rise. Ten percent of the white population owns 80% of the country's wealth and eight percent of the population controls 72% of the land.²⁰² Experts however disagree on the reasons for the grotesque failure in achieving the goals of local development and service delivery. Mainstream experts attribute the failures to national governments resistance to building the capacity of local governments, interference, corruption, incompetence, institutional decay and lack of accountability.²⁰³ There is also centralization drive within the ANC. Federalism or devolution is not a top priority of the ANC's policy agenda and has indicated on various occasions to reduce the number and competence of provinces. As a party with leftist inclinations in the past, its top-down hegemonic decision making process also favors centralization. With the failure in local government institutions, ANC also uses that as an excuse to recentralize power.

Left oriented experts however consider the failure as a systemic one. ANC's effort to transform the South African society and economy through inclusion has only resulted in the co-optation of small portion of Black South Africans to a predominantly untransformed white dominated

²⁰² South Africa: the Most unequal country in the world: World Bank Report at <https://www.aljazeera.com/news/2022/3/10/south-africa-most-unequal-country-in-the-world-report#:~:text=South%20Africa%20is%20the%20most,World%20Bank%20report%20has%20said>, March 10, 2023.

²⁰³ Two of the main experts on devolution in South Africa Nico Steytler and Jaap de Visser have in many of their publications promoted the South African model of Devolution to many other countries in Africa including Kenya and consider the main challenge is not in the constitution per se but in its failure to deliver the promises.

economy. The constitution and its transformation role (hence transformative constitutionalism,²⁰⁴ that is political, economic and social equality of all South Africans regardless of differences in race, language and class) has faltered. They consider the liberal constitution and its protection of property rights as something that has perpetuated colonial legacy of inequality and call for ‘finishing the unfinished business of decolonizing the constitution’ including the expropriation of land.²⁰⁵ They think that the current constitution along with its liberal ideological orientation cannot address the existing inequality. In short, in the name of non-racial democratic South Africa, the system allows white minority to retain its wealth and economic hegemony. They argue, it is systemic problem and needs systemic change.

Unlike the Ethiopian federal system that lacks judicial review, what gives hope to the South African devolution is the role of courts in particular the Constitutional Court and its rule of law system. Courts play a predominant role in shaping the system of devolution, demarcating the respective competencies autonomously and guarding against centralization. In a well celebrated decision the Constitutional Court even sent former president Jacob Zuma to jail for failing to comply with court order to provide evidence before an inquiry body in charge of investigating high level corruption charge. Constitutionalism has prevailed over abuse of power. As the ANC continues to lose local elections in bigger cities, democratization at the local level may also enhance local level participation and accountability, possibly giving a new life to the system of devolution in South Africa.

4.3.4 *Kenya*

Issues related to federalism and devolution of power also remain relevant in Kenya. Kenya’s central government since independence in 1963, under

²⁰⁴ See Pius Langa, ‘Transformative Constitutionalism,’ *Stellenbosch Law Review* 17:3 (2006).

²⁰⁵ See Tshepo Madlingozi, ‘The Proposed Amendment to the Constitution: Finishing the Unfinished Business of Decolonization,’ *Critical Legal Thinking* (2018) 6 April 2018; see also Joel Modiri, ‘Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence,’ *South African Journal on Human Rights* 34 (2018).

an 'imperial president'²⁰⁶ with its patronage system, has been blamed for skewed development that favors some regions and the Kikuyu political elite, while leaving others at the margins and sowing the seeds politization of ethnicity.²⁰⁷ According to Anderson, Kenya's past leaves no doubt that 'real or perceived exclusion along ethnic lines led to political and ethnic conflict.'²⁰⁸ The 2007 presidential election most visibly and violently exposed Kenya's political and ethnic divide. The 2010 constitution was part of the package to resolve the root causes of the violence and aims to address some of these issues through the combination of integration and devolution.

Kenya with a population estimate of 54 million people has some 42 ethnic groups and minorities. Of these, the Kikuyu (dominant in the central and eastern provinces) constitute 22%, Luhya (dominant in the west province) 14%, Luo (dominant in the Nyanza province) 13%, Kalenjin (dominant in the Rift Valley province) 12% and Kamba 11%.²⁰⁹ This diversity has generated debates on how to manage it and establish more inclusive and legitimate institutions. This is particularly so when the political elite articulates clearly that there is such structural problem, and the lack of inclusion is attributed to domination of one group over others, a matter that along with other factors, hit hard Kenya's 2007 election crisis.²¹⁰

²⁰⁶ Susanne Mueller, 'The Political Economy of Kenya's Crisis,' *Journal of Eastern African Studies* 2:2 (2008): 197.

²⁰⁷ Westen Shilalo, *Political Power and Tribalism in Kenya* (Palgrave Macmillan, 2018): 4.

²⁰⁸ David Anderson, 'Yours in the Struggle for Majimbo: Nationalism and the Party Politics of Decolonization in Kenya 1955–64,' *Journal of Contemporary History* 40:3 (2005): 549.

²⁰⁹ Michael Chege, 'Kenya Back from the Brink?' *Journal of Democracy* 19:4 (2008): 126–127.

²¹⁰ Many authors seem to agree that the 2007 election was simply a spark that ignited years of accumulated unresolved grievances starting from the Kenyatta era all the way to the election time which was the boiling point. See for details Mueller (n 190): 185–210; Daniel Branch and Nic Cheeseman, 'Democratization, Sequencing, and State failure in Africa: Lessons from Kenya,' *African Affairs* 108:430 (2008): 1–26; Njoki Ndungu, 'Kenya the December 2007 Election Crisis,' *Mediterranean Quarterly* 19:4 (2008): 111–121; Chege (n 193): 125–139.

Kenya, often called the ‘bastion of peace’²¹¹/economic power house²¹² in an otherwise troubled region of east Africa, attracted a lot of attention from the academia following the December 2007 election crisis. Since then many scholars have analysed the causes of the post-election crisis that claimed more than one thousand lives and displaced half a million people.²¹³ This section discusses the notions of devolution and power sharing as relevant alternatives to address Kenya’s age old crisis of governance in the form of unitary and centralized rule symbolized in the office of the president. The claim is that unless Kenya somehow adopts a flexible system of power sharing and a genuine devolution, it is unlikely to sustain its stability and social cohesion. This section also questions whether the dissolution of the office of the prime minister, first established as a transitional arrangement, in the 2010 constitution, is appropriate given the fact that the claim for executive power sharing remained central to political debates.²¹⁴

4.3.4.1 *Background to Devolution: Majimbo-Provincial Based Ethnic Self-Rule*

As independence from Britain approached, many groups were concerned with dominance by the Kikuyu elite, and so demanded institutional safeguards. Kenya African Democratic Union (KADU) and minority groups argued for federalism or some form of devolved government that aims to protect relative minorities from being dominated politically and economically by relative majority groups, notably the Kikuyu. Kenya’s version of federalism was presented as an alternative to a unitary system by KADU during the last phase of the colonial era.²¹⁵ This gave rise to a constitution that provided a province based parliamentary federalism (*Majimbo*)

²¹¹ Gabrielle Lynch, ‘Courting the Kalenjin: The Failure of Dynasticism and the Strength of the ODM Wave in Kenya’s Rift Valley Provinces,’ *African Affairs* 107:429 (2008): 542.

²¹² Chege (n 209): 127.

²¹³ Lynch (n 211): 542; Ndungu (n 210): 117.

²¹⁴ See Chege (n 209): 138; Ndungu (n 210): 118.

²¹⁵ See Anderson (n 209): 547–548, 552; Henry Amadi, ‘Kenya’s Grand Coalition Government- Another Obstacle to Urgent Constitutional Reform?’ *Africa Spectrum* 44:3 (2009): 149–164; Gabrielle Lynch (n 211): 558–559; Erik Kramon and Daniel Posner, ‘Kenya’s New Constitution,’ *Journal of Democracy* 22:2 (2011): 102 at Footnote 2.

at independence in 1963. *Majimbo* in Swahili means province and majimboism referred to a federal system where some crucial powers are devolved to colonially defined provinces that nearly coincide with the major ethnic groups.²¹⁶ The debate whether Kenya should be unitary or federal thus dates back to the run up to the independence struggle. Former President Daniel arap Moi, then the leader of KADU joined other Rift Valley politicians in backing *majimboism* while Jomo Kenyatta (Kenya's first President from 1963 to 1978) and his Kikuyu allies supported centralized presidential rule.

Although the parliamentary federation that provided for eight provinces and divided the executive between a prime minister as head of government and president elected by the cabinet as chair and head of state was dismantled soon after independence, the demand for *Majimbo* persisted with the end of one party rule after the end of the Cold War. During debates on various draft constitutions between 2000 and 2006, there was continued interest from various sections of society to incorporate some form of devolution, and the concept regained its constitutional status in 2010. Devolution is the preferred term as included in the 2010 constitution that in short includes limited autonomy at county level where the counties elect their assemblies and appoint their executive and where the counties would receive 15% of the national budget.

Deep in Kenya's political system seems an embedded debate between the ruling Kikuyu elite keen to maintain its control and privilege using a strong president and centralized administration that views decentralization as a means to eliminate Kikuyu outside of their homeland and the political elite that claims marginalization from the system that is keen to share power at the center (division of power between the president and Prime Minister) and devolve power to subunits. Those who feel that Kenya's political system has marginalized their ethnic kin have proposed more decentralization of power to Kenya's provinces and power sharing at the center, a proposal that Kenya came near to following the 2007 election crisis.²¹⁷

²¹⁶ Jacqueline Kloop, 'Ethnic Clashes' and Winning Elections: The Case of Kenya's Electoral Despotism,' *Canadian Journal of African Studies* 35:3 (2001): 483.

²¹⁷ Ibid.: 476–7.

Land also remains a divisive issue in Kenya particularly in the rift valley province where tension between Kalenjin and Kikuyu persisted and was a source of conflict in the 1992 and 1997 elections, way before 2007.²¹⁸

It was in this context that the 2002 presidential and parliamentary elections were set. While Moi decided not to run for the presidency, which was a step forward, he tried to maintain his influence within the party by picking up a young politician from the Kikuyu, son of former President Kenyatta, Uhuru Kenyatta as his successor.²¹⁹ On the other side of the political spectrum, the fragmented opposition learning from its weaknesses in the 1992 and 1997 elections formed a formidable coalition.²²⁰ The opposition National Alliance Rainbow coalition (NARC) brought together two major blocs: defectors from KANU, now renamed as Liberal Democratic Party (LDP) symbolized by Raila Odinga, and Mwai Kibaki's National Alliance of Kenya (NAK), later named as the Party of National Unity (PNU). The loose but grand coalition won the 2002 parliamentary and presidential elections, Kibaki becoming the new president and ending 40 years of KANU rule and Moi's dictatorship since 1978.²²¹ This was an interesting development as Kenyans witnessed a peaceful transition of power from one party to another. But the coalition was based on firm pre-election commitment signed in October 2002 a memorandum

²¹⁸ Branch and Cheeseman (n 210): 8–11; Muller (n 206): 197. In deed one writer wrote in 2000 'the land situation in Rift Valley province has remained as volatile as it has always been during the second half of the last century. It is some kind of volcano waiting to erupt... It is the one problem that is not capable of being resolved in the short run to the satisfaction of the two parties in conflict, i.e. the indigenous communities and the "outsiders".' Though not much is reported the clashes in 1992 did cause nearly the same casualties as in the post 2007 election crisis. Walter Oyugi, *Politicized Ethnic Conflict in Kenya: A Periodic Phenomenon* (Addis Ababa, conference paper unpublished, 2000) (with the author): 10.

²¹⁹ Disputes over Moi's succession forced Raila Odinga to move to join the NARC pact with Mwai Kibai. David Anderson, Briefing: Kenya's Election 2002- The Dawning of a New Era? *African Affairs* 102:331 (2003): 342.

²²⁰ In 1992, Oginga Odinga, Raila Odinga's father and historic leader of the independence movement, Kenneth Matiba and Mwai Kibaki, both from Central Province, were unable to agree on a single champion. Five years later, Kibaki, Raila Odinga and Charity Ngilu from Ukambani made the same mistake. Anderson (n 209): 342, 331; J. Barakan, 'Kenya after Moi', *Foreign Affairs* 83:1 (2004): 90; See Report No. 137 of the International Crisis group, Kenya Election Crisis 21 Feb (2008): 2.

²²¹ Kramon and Posner (n 215): 91.

of understanding (MOU) between NAK and LDP on crucial issues identified as vital for introducing constitutional and political reform.²²² The MOU, among other things provided for a mixed executive with a strong prime minister appointed through a parliamentary majority and weak but elected president—agreed to be Kibaki, equal sharing of cabinet positions, and devolution of power to provinces with the hope that those marginalized for long will become a majority in their provinces if they lose power at the center.²²³

4.3.4.2 *Alliance Crumbles, New Coalitions, constitutional reforms*

Yet once Kibaki became president, he failed to honor the pact (just as Kenyatta did to Odinga Odinga, Raila Odinga's father in 1964) and backed a strong presidency more along his predecessors.²²⁴ The issue of devolution was abandoned as it was viewed as a tool to evict the Kikuyu living outside of their home provinces, particularly those in the Rift valley. A mixed executive was also considered as a system that divides Kenyans along ethnic lines. The LDP also received less than an equal share in cabinet positions, and felt betrayed, eventually withdrawing from the coalition. The breakdown of this grand coalition cost Kenya dearly in the 2007 elections. According to Branch and Cheeseman, respecting the NARC pact would have provided the best opportunity to avoid the ensuing elite fragmentation.²²⁵ Indeed, this triggered marginalized groups to come together and frame the issues in the 2007 election. The seeds of devolution as included in the 2010 constitution and worsening of the ethnic divide and political mobilization were concretized with the violation of the pact by the centrist elite.²²⁶

The two rivals, Odinga as a candidate of the ODM and Kibaki as candidate of the PNU, who knew each other very well since the NARC pact, faced each other in the December 2007 parliamentary and presidential elections. Kibaki's now weakened PNU faced the ODM, an ambitious

²²² Barakan (n 220): 91–92.

²²³ Chege (n 209): 129.

²²⁴ Ibid.: 129; Kramon and Posner (215): 91.

²²⁵ Branch and Cheeseman (n 210): 17.

²²⁶ For the detail intricacies and position of the parties see Alicia Bannon, 'Designing a Constitution Drafting Process: Lessons from Kenya,' *The Yale Law Journal* 116:8 (2007): 1837–1838.

and broad-based coalition, in a campaign that started peacefully, but also had voters divided along ethnic and regional lines enjoying nearly equal weight. The fact that constitutional and political reform was postponed for long also implied that there were years of accumulated grievances from those groups who felt either betrayed or were marginalized for long. The land redistribution issue in Kenya particularly in the rift valley province is an age old problem where the Kalenjin feel that rich settler Kikuyu's have amassed wealth at their expense since independence.²²⁷ Luo leaders as well think they were systematically excluded from power for long. There was also the perception that key executive positions like the head of the army, the presidency, minister of finance, foreign affairs went to the Kikuyu elite.

It was thus no surprise that, as the election date approached, slogans like '41 against one,' 'Kenya against Kikuyu'²²⁸ became part of the campaign. Perceived ethnic inequality was to be manipulated by the opposition political entrepreneurs in response to government rigidity not to introduce reform and interest to maintain the status quo. The election became a battle ground for airing age old grievances and 'ethnic identity became salient because the cleavages overlap with other societal divisions such as regional/ethnic inequality, control over land and access to political opportunity.'²²⁹ The election became a trigger, a boiling point for accumulated grievances. Another factor that aggravated the post-election crisis was the fact that both contenders were too close and the electoral body that administered the election hastily announced PNU's victory and conducted an oath declaring Kibaki president. This put the last nail on the coffin.

What followed was a disaster that came to an end only after a deal was brokered by the late UN Secretary General Kofi Annan. The post-crisis negotiations provided for a power sharing scheme between the two rivals where Kibabki remained President while a newly created office of Prime Minister went to Raila Odinga, and a package of other proposals to address the long overdue causes of the crisis: equal sharing of cabinet positions, land ownership and use, dealing with grand level corruption,²³⁰ enforcing

²²⁷ Branch and Cheeseman (n 210): 7.

²²⁸ Quoted in Chege (n 209): 133.

²²⁹ Branch and Cheeseman (n 210): 3.

²³⁰ For more on grand level corruption in Kenya see Mueller (n 206): 198.

the rule of law and devolution of power.²³¹ More crucial was the facilitation of the drafting process of the new constitution before the 2012 parliamentary and presidential elections. The new grand PNU-LDP coalition started office in February 2008 and introducing a new constitution remained one of its priority. While the ODM insisted on maintaining the office of the prime minister, and hence a divided executive, and the devolution of power at various levels, the PNU insisted on having a strong and centralized president and devolution of power only at the district level.

The draft ultimately received the endorsement of both Kibaki and Odinga and was adopted in a referendum held on August 4, 2010. The final constitution reflected the positions of the PNU with a concession to ODM allowing devolution only at the county level and introduced modest limits on the power of the President. While the level of patience and tolerance among the various factions to reach this stage following the election crisis is admirable, some of the contents of the new constitution, for example, the dissolution of the office of the PM, however are surprising given the unanimity among the key observers of Kenya's political process in maintaining it²³² and the continued insistence from the side of the ODM all along until the drafting of the 2010 constitution.²³³

As witnessed in the electoral campaign towards the 8 August 2017, Kenya lacking clear dominant ethnic group, was split by a rivalry between two fairly close ethnic coalition blocks.²³⁴ Nominally, article 91 of Kenya's 2010 constitution does not allow political parties to be organized on sectarian, ethnic, religious or region basis, but pre-election ethnic coalition blocks largely reflect the role of identity politics in campaigning more than class and interest based competition. In practice, presidential elections remain ethnic contests. The Kikuyu-Kalenjin coalition has won the last four consecutive presidential elections. In the 2013 and 2017 elections, the Jubilee Party and its candidate Uhuru Kenyata (Kikuyu) along with his deputy President William Ruto (Kalenjin) had its social base from the two ethnic groups that together constitute only 36% of Kenya's population. Not surprisingly, since 1963 the President's office and the other

²³¹ Amadi (n 215): 153–154; Barakan (n 220).

²³² Chege (n 209): 97.

²³³ Ibid.: 130.

²³⁴ Michael Chege, 'Kenya's Electoral Misfire,' *Journal of Democracy* 29:2 (2018): 158–159.

key positions have been dominated by elites from the two ethnic groups (Kikuyu 1963–1978 and after 2002 and Kalenjin under Moi between 1978 and 2002). Raila Odinga's (Luo) National Super Alliance (NASA) was supported by Luo, Luhya, Kamba and Mijikenda constituting 40% of the population in Kenya. NASA's campaign reflecting anger and frustration at the old elite that controls power focused on 'dismantling the old order,' liberating Kenya from bad governance and corruption, greater ethnic inclusion in public appointments, grand coalition government at the center and more power and revenue to devolve to counties.²³⁵

Despite the promise of devolution that aimed to limit the high stakes of power in the presidential office, presidential elections in Kenya remain divisive and very much contested. Although significant progress has been made towards democratization since 2002, presidential elections are often disputed and the integrity of the electoral management body has been questioned.²³⁶ NASA challenged the August 2017 presidential election in which Uhuru Kenyatta has been declared a winner and the Supreme Court nullified it ordering rerun on accusation of vote irregularities. NASA also questioned the integrity of the electoral management body and refused to participate in the rerun held in October 2017. Following that Raila Odinga declared the establishment of 'peoples Assembly' calling himself as 'peoples President' challenging the legitimacy of the elected President.²³⁷ Tensions continued until Uhuru Kenyatta and his rival Raila Odinga made a magic handshake in 2018 that later led to the Building Bridges Initiative (see below) and Jubilee Party backing Odinga in the 2022 election campaign. The fact that presidential candidate has to garner wide support from the Counties in addition to the individual voter makes the link between presidential elections and counties stronger with the latter facing the brunt of campaign politics and the need for ethnic alliances.

Thus after some years of experience with devolution under a presidential system, ethnic mobilization has not withered away and there are debates on political and constitutional reforms to abandon presidentialism

²³⁵ Ibid.: 166.

²³⁶ Ibid.: 161.

²³⁷ Hannah Waddilove, 'Assessing Devolution's effect on Central Power during Kenya's 2017 Presidential Re-run,' *Journal of Eastern African Studies* 13:2 (2019): 161.

Ibid.

and return to parliamentary system with cabinet based power sharing.²³⁸ The Building Bridges Initiative (BBI) that followed the magic handshake between President Uhru Kenyata and Raila Odinga in 2018 partly aimed at amending the constitution to bring back the position of the Prime Minister along with two deputies, an opportunity missed in the making of the 2010 constitution but the Kenyan High Court nullified it stating the BBI as unconstitutional and was confirmed by the Supreme Court although it was approved by more than half of the Counties and the two chambers at national level.²³⁹ The High Court cited the basic structure doctrine and decided the basic structure of the constitution cannot be changed.²⁴⁰ It should be mentioned that Courts in Kenya play a key role in enforcing the constitution and checking the mandate of the national government over Counties.²⁴¹ Kenya's 2010 constitution establishes an independent court and mandates its Supreme Court to hear controversies related to presidential elections requiring it to make decisions within fourteen days (Article 140). Kenya's Supreme Court made a land mark decision by a majority of 4 to 2 in 2017 over a petition submitted by the opposition stating that the Electoral body has not managed the election as required by the constitution and other laws and declared the presidential election as 'invalid, null and void.'²⁴² It issued a rerun in sixty days. Furthermore, the President accepted the decision albeit grudgingly complaining about 'crooks and criminal judges' overturning the will of

²³⁸ Michael Chege (n 234): 167. Interestingly, the ruling elite in Ethiopia wants to abandon the parliamentary system and shift to a presidential system.

²³⁹ See *Attorney General & 2 Others v David Ndi & others* <https://www.judiciary.go.ke/download/petition-no-12-of-2021-consolidated-with-petitions-11-13-of-2021-building-bridges-initiative-bbi-full-supreme-court-judgement/> For the Court of Appeal decision, see <https://www.judiciary.go.ke/download/court-of-appeal-final-orders-on-bbi-appeals/>; J.M. Mbaku, 'Is the BBI Ruling a Sign of Judicial Independence in Kenya?' *Brookings* (19 August 2021) <https://brook.gs/3xw9TL5>, last accessed August 20, 2021.

²⁴⁰ This is a doctrine developed by the Indian Supreme Court in *Kesavananda Bharati vs. State of Kerala* and another (1973) 4 SCC, 225 that quashed undue Union Government intervention in states as violation of federalism. It stated federalism is basic structure and cannot be changed.

²⁴¹ Conrad Bosire, 'Implementation of Devolution under Kenya's 2010 Constitution: Political Resistance and the Struggle for the Ideals of Constitutionalism,' in Charles Fombad and Nico Steytler eds., *Decentralization and Constitutionalism in Africa* (Oxford: Oxford University Press, 2019).

²⁴² See for details Karuti Kanyinga and Collins Odote, 'Judicialization of Politics and Kenya's 2017 Election,' *Journal of Eastern African Studies* 13:2 (2019): 235–252.

the people. Nearly all presidential elections in Kenya since return to multi-party have been controversial and the Supreme Court did not hesitate to review the process of election having its own impact on the democratic process.²⁴³

4.3.4.3 *Will the New Constitution Ensure Inclusive Political System?*

Unlike its northern neighbour Ethiopia, Kenya seems to have favored a cautious way of dealing with the demands of marginalized groups. Surely the new constitution acknowledges the fact that Kenya is a nation of great diversity manifested in the form of ethnic origin, religion, culture and geography but the intention is more along the lines of integration, not accommodation. Although there is consensus among political analysts and actors on the view that power sharing is the most viable means for managing conflict in divided societies, there is great degree of variation in the details between the integrationist²⁴⁴ and accommodation²⁴⁵ alternatives. Kenya seems to have opted for the former.

A reflection of the ‘integrationist model’ can be traced in some provisions of the 2010 Kenyan constitution. Article 91 states ‘every political party shall have a national character’ and the political parties need to manifest Kenya’s diversity. Political parties cannot be organized based on religion, language, ethnic, regional... lines. More important are provisions meant to give political parties *incentives* to appeal across ethnic / regional lines. For example, each candidate for the presidency is required to name a running mate for office of deputy president (Article 148) and garner at least 50% + 1 of the votes cast in election and at least twenty-five percent of the votes in each of more than half of the 47 counties. The electoral system for both houses of the national legislature and the county assemblies are stipulated under Article 97 to be based on First Past the Post with a possibility of proportional representation for women, youth and persons with disability. The executive (Article 130) is required to

²⁴³ For details on role of Courts in federal and devolved systems in Africa see Yonatan Fessha and Karl Kossler eds. *Federalism and the Courts in Africa: Design and Impact in Comparative Perspective* (London: Routledge, 2020).

²⁴⁴ Horowitz (n 16): 15–37; Benjamin Reilly, *Democracy in Divided Societies: Electoral Engineering for Conflict Management* (Cambridge: Cambridge University Press, 2004).

²⁴⁵ Lijpart (n 34), 96–99; Arend Lijphart, ‘Consociation and Federation: Conceptual and Empirical Links’, *Canadian Journal of Political Science* 12:3 (1979): 500.

reflect Kenya's regional and ethnic diversity.²⁴⁶ The president is required to appoint cabinet ministers drawn from outside parliament and parliament must approve both presidential appointments and dismissals (Article 132). Parliament is also empowered to exercise some element of oversight and control over the executive (Article 95).

Another major element of the new constitution is devolution. Like South Africa, the constitution does not explicitly refer to federalism. Yet the division of power between the national government and counties and other key elements of devolution are constitutionally entrenched and the choice of devolution, rather than federalism, is to ease the centrist elite fear. Devolution is also stipulated as core principle and national value (Article 10(2) a), albeit at the county level. One should note that the constitution skips the provinces and only constitutionalizes county based decentralization. An analysis of the mandates of the Counties (see below) shows it is local level devolution, not equal to sub-units in classic federations. The constitution grants counties limited autonomy and ensures their representation in the Senate. The constitution's fourth schedule outlines the respective powers of the national government and the counties. Foreign affairs, language, national economy and planning, international trade, immigration and citizenship, police service, courts, currency and banking, monetary, education, housing, health, agriculture, veterinary, energy, disaster management and tourism are assigned to the national government.²⁴⁷ Counties are empowered to enact laws related to agriculture, health, transport, racing, liquor licensing, cinemas, libraries, county health services, county roads, county transport, the environment and elementary education. Counties have the mandate to participate in the amendment of the constitution (Article 257) and can regulate community land (Article 63). The allocation of functions in many ways resembles the South African system where most of the socio-economic sector falls into concurrent list with an overlap of mandates. Experts indicate the allocation of competencies between the national and county governments lack clarity and the overlap has created conducive environment for the national government to occupy the field leaving

²⁴⁶ See Articles 130, 131, 232 of the 2010 Kenyan constitution.

²⁴⁷ Schedule 4 Articles 5, 9, 10, 15, 20, 28–35.

counties with mandate to implement national laws and policies.²⁴⁸ In case of conflict between national and county law in the areas where there is overlap, national law prevails (Article 191). Besides Article 186(4) empowers the parliament to legislate on ‘any matter.’ Article 196(1) mandates national parliament to legislate on powers, privileges and immunity of counties. These provisions provide sweeping mandate to the national government to intervene on country mandates and hence the argument that County based devolution differs from sub-unit based autonomy in classic federations.

Counties have their own elected governors and a legislative assembly. The counties are also entitled to 15% of the national revenue (have been pushing for an increase to 35% unsuccessfully) and further decisions on resource allocation are to be made by a newly established senate (and the National Assembly) composed of county representatives, not by the federal executive.

As hinted already, the devolution in Kenya aims only at the county level. While Kenya’s provinces largely coincide with the major ethnic groups, the new constitution does not grant any powers to provinces. While partly based on colonial era districts, save for melting pot urban counties of Nairobi, Mombasa, Nakuru and Eldoret, ‘most of the counties have homogeneous major ethnic groups that consider their county as theirs.’²⁴⁹ Even names of some counties correspond to the name of the majority tribe such as Turkana, Samburu, Pokot, Nandi, Kisii, Embu and Meru. Yet this does not give the whole story.

Similar to the logic of integrative federalism, larger ethnic groups do not have ethnic homelands at county level. The county boundary divides the larger ethnic groups into several counties. One should add that Kenya has 47 counties compared to only 36 states in Nigeria—Africa’s most populous country—. The home province of the most influential and larger ethnic groups: Central (Kikuyu), Nyanza (Luo), Western (Luhya)

²⁴⁸ John Mutakha Kangu, *Constitutional Law of Kenya on Devolution* (Nairobi: Strathmore University Press, 2015): 184–185; see also Conrad Bosire, ‘Powers and Functions of Country Governments in Kenya,’ in Nico Steytler and Yash Ghai eds., *Kenyan-South African Dialogue on Devolution* (Claremont: Juta, 2015): 82, 184.

²⁴⁹ Abraham Rugo Muriu, ‘Number, Size and Character of Counties in Kenya in Nico Steytler and Yash Pal Ghai eds. *Kenya-South African Dialogue on Devolution* (Juta, 2015): 108.

and Rift Valley (Kalenjin) provinces are subdivided into several counties.²⁵⁰ For example, the Kikuyu and the Kalenjin have been sub-divided into five counties each, the Luo and Luhya into four, Kamba, Maasai and Somali into three counties.²⁵¹ The county system does not take the ethnic/religious based provinces as building blocks during political engagement but rather breaks them into smaller units. Furthermore, while the constitution outlines broader objectives of devolution (Article 174) that includes limiting the imperial presidency, ensuring development and ethnic harmony and reducing conflicts, the overall design shows a major focus on development and service delivery, and less on ethnic accommodation.²⁵² The principal logic is to make it easier for the national government that controls power to manage many smaller size counties than small number of bigger size ethnic-based provinces. Furthermore, the national government can suspend a county government for ninety days and then hold fresh elections.²⁵³ As in Nigeria, the likelihood of federal centralization that came with smaller size thirty six states seems on its way in Kenya.²⁵⁴ Limiting the risks of centralization associated with imperial presidency is possible with smaller number of bigger size constituent units, although as witnessed in Ethiopia's post 1991 federation, a hegemonic and dominant ruling party limited that possibility despite nine, bigger size ethno national based states in a country that has roughly twice the population of Kenya.

The key challenge for the process of devolution in Kenya is whether the new constitution will in fact favor county level decentralization or will the age-old political elite drag its feet and falter on its promises. While comparing the system of devolution in Kenya and South Africa, Yash Ghai wrote that with the 'hostility of (national) government to the implementation of and respect for devolution...there is considerable anxiety that if power was too widely distributed, it would negate the national

²⁵⁰ Conrad Bosire, *Devolution for Development, Conflict Resolution and Limiting Central Power: An Analysis of the Constitution of Kenya 2010* (Unpublished LL.D thesis, University of the Western Cape, 2013): 226.

²⁵¹ Ibid.: 228–230; Rugo Muriu (n 249): 109.

²⁵² Bosire (n 250): 222.

²⁵³ Yash Ghai, 'South African and Kenyan System of Devolution: A Comparison,' in Nico Steytler and Yash Ghai eds., *Kenyan-South African Dialogue on Devolution* (Juta and Company, 2015): 7.

²⁵⁴ Bosire (n 250): 245.

government's vision of bringing development as ethnic affiliations may retard economic and political progress'.²⁵⁵ Central power-holders find all excuses to keep it. The Kikuyu elite used to maintaining a strong presidency and centralized administration may be resistant to easily give up to the process of decentralization or may use the new counties to create new form of patronage in a way that either frustrates the process of decentralization or compromises their autonomy. This is a very common problem for example in Ethiopia where the party system is used as a tool to control the elite at the state level and the latter may go to the extent of forgoing their autonomy for the sake of retaining power at the local level. How this evolves in Kenya in the forthcoming years is something that time will tell. But success in this regard is a major precondition to Kenya's political stability and in redressing inequalities. Along this line, Bosire mentions two major obstacles to Kenya's devolution.²⁵⁶ First, the national political elite in control of the presidency is likely to perceive devolution *as a threat* to its grip on power and resources. Efforts at decentralization since 1963 have collapsed because of this very reason. State practise and literature on devolution in Kenya show that political will and commitment on the part of the national government and its elite to the goals of devolution in terms of transfer of power and resources to counties and the building of their capacity are preconditions for devolution to succeed at the country level. Tendencies for imperial center are still visible and could frustrate the promised devolution. Secondly, the presidency as an institution is the focus of elite and media attention as it is widely perceived as a means through which ethnic elites can control state resources, economic opportunities and powers. It is for this reason that presidential elections along the power to make and break the executive make the stakes high often leading to deadly ethnic conflicts as it is seen as a zero-sum game with winners and losers. At times, this could create permanent winners pitted against permanent losers making politics and election even more deadly.

Kenya's 2010 constitution with its 47 counties each with directly elected governor and senators primarily aim at transforming the country's politics by reducing the high politics in the office of the presidency.

²⁵⁵ Yash Ghai (n 253): 9.

²⁵⁶ Conrad Bosire, 'Political Structures and Politics of Counties in Kenya,' in Nico Steytler, Yash Ghai eds., *Kenyan-South African Dialogue on Devolution* (Juta and Company, 2015): 136–137.

The presidency and the power and resources it commands make it divisive as witnessed in the 2007 and 2017 elections. It was less violent in the 2013 elections as the opposition at the national level won a majority in no more than half of the counties and governorate positions and thus become a majority at county level.²⁵⁷ In this sense devolution has made losers at national level to be winners at county level lowering down the high stake of power at the center. Newly elected governors under the control of the opposition continue to defend local autonomy and political pluralism has reinforced horizontal accountability at local level. Besides there are signs that devolution has begun to deliver in the socio economic sector. Access to education and water at the lower level, agricultural inputs and country health services have improved. Given that some of the counties have been marginalized for long this is an important progress.²⁵⁸ Thus, diffusing power and service delivery, not accommodation and empowerment of ethno national minorities, is the primary objective of the system. The Ethiopia's federalism is primarily preoccupied with ethno national accommodation and their political empowerment, although ending extreme centralization and service delivery come as a consequence, not as primary goals.

4.4 INSTITUTIONAL DESIGN

Given the complicated nature of territorial cleavages, the different levels of political mobilization, the nature of the elite that frames the issues and state response (accommodative, integrative or repressive), schools of thought vary on whether the 'cleavage and difference be recognized, emphasized, institutionalized and empowered or should it be diffused, blurred, transcended.'²⁵⁹ As will be shown later, one among the several reasons that determine the choice for institutional design is the nature of the cleavage and its level of mobilization. We noted in chapter two institutions are not designed in the abstract. Unlike the legal institutional approach, the federal society approach looks into the nature

²⁵⁷ Nic Cheeseman, Karuti Kanyinga, Gabrielle Lunch, Mutuma Ruteere and Justin Willis, 'Kenya's 2017 Election: Winner-takes-all Politics?' *Journal of Eastern Africa* 13:2 (2019) 216.

²⁵⁸ Ibrahim Harun, 'Development and Peace Building in Kenya, Fact or Illusion? The Case of Marsabit County,' *Perspectives on Federalism* 11:3 (2019).

²⁵⁹ Murray and Simeon (n 35): 411.

of the cleavage, its level of political mobilization and how it impacts the dynamics of institutional design. Ultimately, political reality requires constitutional designers to be flexible and to combine a mix of accommodation and integration. Integration policy to ensure social cohesion, unity and common citizenship and accommodation policy to provide political and identity space for sub state nationalism and minimize state break up, and more importantly to ensure much needed peace remains critical. At the root of ethno national based mobilization, in addition to the recognition of identity, is addressing the social, political and economic injustices, real or perceived, ethno national minorities face in the hands of the centralized state.²⁶⁰ Thus, whether one chooses integration or accommodation, the end goal is ensuring a just political and economic order in the polity both for those who want to pursue integration and the ethno national minority that pushes for accommodation. Thus a mix of accommodation and integration could be possible but for the sake of clarity each option is presented separately.

4.4.1 *Integration*

One softer option advocated by many experts and international organizations such as the European Union, World Bank, and IMF²⁶¹ is the integrationist federal system advocated by Donald Horowitz,²⁶² practised in Nigeria, South Africa²⁶³ and Kenya. Post-colonial Africa also resorted to integration as the new leaders thought ethnic divisions will be obstacles to unity and national integration. Ethiopia's centrist elite has for long either resisted federalism or, when it thought unitary system would make it unpopular in the context of highly mobilized ethno national groups, resorted under pressure and half-heartedly towards 'geographic federalism':²⁶⁴ the Ethiopian version of integration. Ethiopia's new leader, Prime Minister Abiy Ahmed, has indicated this model as his preferred

²⁶⁰ Will Kymlicka, *Success, Failure and the Future* (Migration Policy Institute, 2012).

²⁶¹ See for details Kymlicka (n 2).

²⁶² Horowitz (n 16): 18.

²⁶³ See Richard Simeon and Murray (n 35): 70–71.

²⁶⁴ This is the position of nearly all centrist parties such as the Coalition for Unity and Democracy in 2005, now rebranded as *Ezema*, Ethiopian Democratic Party (EDP) and All Ethiopia Unity Party. Refer to *The Third Way* (2010), by Lidetu Ayalew (a vocal opposition figure), which prescribes to federalism but not on ethnic basis.

system and hinted to amend the constitution along that line.²⁶⁵ Lately, Ethiopian Citizens for Social Justice (*Ezema* in Amharic)²⁶⁶ has issued its policy that propounds a presidential system, strong federal government and Nigerian type of weaker regional states with the major ethno-national groups broken down into several smaller states. Some experts have labelled the current pluri-national federation as ‘tribal’²⁶⁷ and the design as having ‘original sin’ that has elevated ethnic identity to a primary political identity.²⁶⁸ In the following two sections we will demonstrate the pillars and limitations of the integrationist approach to Ethiopia and argue the ‘sin’ is rather in denying already politically mobilized ethno-national groups to self-government and such groups are not tribal per se as they claim self-government as defined in chapter one.

The intellectual and ideological roots of integration are often linked to American federalism. American experts of federalism, compared to their counterparts in Europe, prefer integrationist federation with the sole aim of diffusing power to many centers. In the process of adopting the United States federation (1789), ‘it was decided that no territory would receive statehood unless minorities were outnumbered by white Anglo Saxon Protestants’²⁶⁹ and hence there is little overlap between ethnic groups

²⁶⁵ Tom Gardner, ‘Abiy Ahmed and the Struggle to Keep Ethiopia Together’ The Africa Report, available at <https://www.theafricareport.com/18565/abiy-ahmed-and-the-struggle-to-keep-ethiopia-together/?amp=1>, October 11, 2019.

²⁶⁶ Ezema is seen as the heir of the now defunct Coalition for Democracy and Justice (CUD) of 2005. Ezema was established after the merger of Ethiopian Patriotic Ginbot 7, Ethiopian Democratic Party (led by Dr. Chanie Kebede), Unity for Democracy and Justice, and *Semayawi* party in 2019.

²⁶⁷ Minase Haile, ‘The New Ethiopian Constitution: Its Impact upon Unity, Human Rights, and Development,’ *Suffolk Transnational Law Review* 20:1 (1996): 1–84. For those familiar with the concept, tribal (*Gossa* in Amharic) is the most pejorative expression used to criticize the system. Nonetheless, Ethiopia as shown in this chapter has countless ethno-national liberation and regional forces that aim at self-determination and have survived five decades of central onslaught. To state these groups as ‘tribal’ is to deny that the nose is on one’s face.

²⁶⁸ Yonatan Tesfaye, ‘The Original Sin of Ethiopian Federalism,’ *Ethnopolitics* 16:3 (2017): 233.

²⁶⁹ N. Glazer, ‘Federalism and Ethnicity: The American Solution’ in N. Glazer ed., *Ethnic Dilemmas, 1964–82* (Cambridge, MA: Harvard University Press, 1983): 279; see also John Kincaid, ‘United States of America,’ in Luis Moreno and Cesar Colino eds., *Diversity and Unity in Federal Countries* (Montreal and Kingston: McGill Queen’s University Press, 2010): 350–356.

and territory. Indeed, Donald Horowitz (chapter 15 and 15),²⁷⁰ the main architect of centripetal/integrationist federation, who has influenced the design process of most African federations, argued federations should aim to prevent ethnic minorities from becoming majorities at constituent unit level to weaken competing ethno nationalism, prevent a group from becoming a coherent unit, thereby frustrating the potential of becoming a nation state. Yet one needs to note that in the United States, the same majority at federal level also enjoys a majority at sub state level and hence is largely a nation-state federation that has little to offer to strongly mobilized ethno national groups.²⁷¹ As will be illustrated later, in South Africa, Nigeria and Kenya, the subunit boundaries do not generally match the territorial distribution of major cleavages or are drawn deliberately to cut across the main cleavages.

As argued by Alan Kuperman, integration remains dominant trend within the African continent.²⁷² The big men leaders of post-colonial Africa espousing nation building for the newly independent states aimed to construct single national identity through centralized national institutions and policies. One party state, dissolving federal and quasi-federal arrangements (Ethiopia, Sudan Cameroon, Kenya, Uganda and several other federations in West and central Africa), the banning of multiparty until the end of the Cold War, imposing national services were part of the integration project and common trend throughout the continent.²⁷³ Kuperman's position is that this is the existing framework that has to be pursued as departing from it has risks as power holders may react with violence. Yet we know integration induced many of the civil wars and conflicts that engulfed African states in the 1980s. Integration is associated with repression and marginalization, major causes of ethnic conflict.

²⁷⁰ Horowitz (n 32).

²⁷¹ See John McGarry, Brendan O'Leary, and Richard Simeon, 'Integration or Accommodation? The Enduring Debate in Conflict Regulation,' in Sujit Choudhry ed., *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford: Oxford University Press, 2008).

²⁷² Alan Kuperman, ed. *Constitutions and Conflict Management in Africa: Preventing Civil War through Institutional Design* (Philadelphia: University of Pennsylvania Press, 2015).

²⁷³ Crawford Young, 'The End of the Post-Colonial State in Africa? Reflections on Changing African Political Dynamics,' in Nic Cheeseman, Lindsay Whitefield, Carl Death eds., *The African Affairs Reader* (Oxford: Oxford University Press, 2012): 41.

It often leads to unstable political system because it promotes centralization, marginalization of non-core groups and the construction of single national identity often through coercion fuelling conflicts.²⁷⁴ Ethiopia, Sudan, Chad, Liberia, Somalia, Sierra Leone, Congo among other countries have gone through this failed integration projects in the 1980s in one form or another.

The Nigerian presidential federal system has 36 constituent units largely created by the military through a top down process. The major ethno national groups are by design subdivided into several states: the Hausa Fulani in the north into ten; the Yoruba in the west into seven and the Igbo in the east into five. Based on the lesson from Biafra's failed secession, it aims to ensure national unity by creating many smaller subunits. The 1996 South African constitution established nine provinces, most of them new ones. Unlike Ethiopia, the provinces are not designed to coincide with linguistic boundaries and the model rejects empowering distinct ethno-national groups. In some provinces (KwaZulu-Natal, the East Cape, Western Cape and the North West), there is dominant linguistic group but that was more a coincidence than result of deliberate institutional design. Kenya's 2010 constitution that devolves power to 47 counties follows the same logic. It eschews the ethnic-based provincial system that coincides with the major linguistic groups and devolves power to 47 smaller counties. The major groups are divided into five counties. Thus the aim is to blur, diffuse, transcend and cut across differences²⁷⁵ and the redrawing of constituent unit territory seeks to achieve this goal. The system does recognize the right to culture and language as is the case in South Africa, but one can exercise these rights only as an individual. Kenya, Nigeria and South Africa recognize that they are diverse, but do not seek to politically empower diversity. All three federations do not ensure the right to self-rule to ethno national groups. Rather the main objective of the federal system is to diffuse power into many centers to reduce the risks of abuse of power at the center. Besides,

²⁷⁴ For a counter argument within the African continent see Nic Cheeseman, 'How could we Design Democracy to Make it Work in the African Continent,' in Charles Fombad and Nico Steytler eds., *Democracy Elections and Constitutionalism in Africa* (Oxford: Oxford University Press, 2021).

²⁷⁵ Simeon (n 8): 62.

the model does not allow political organization based on ethnicity.²⁷⁶ This contrasts with the accommodation system, discussed below, where recognition of multiple identities to politically mobilized groups is the core feature, and ethno national based political parties are part of the game often reflected as competing nationalisms at sub state level aiming at ensuring self-government.

The underlying assumption of the presidential federal system is that a charismatic and selfless president who wins a popular majority and with wide support from a significant number of constituent units will unify the cleavages.²⁷⁷ Strong federal government run by such president and weaker states where the major ethno national groups are broken down to many smaller units will be less a threat to unity and integrity of the country. As already indicated, the model supports partition of constituent units belonging to ethno national groups even against their will as was the case in Nigeria²⁷⁸ under military rule to prevent emergence of sub state nationalism.²⁷⁹ Integration aims more on building in (enhancing representation at national level) than building out (ethno national based subunits with political autonomy).²⁸⁰ Both Nigeria and Kenya have constitutional rules that encourage political candidates to seek votes beyond their ethnic and social base. For example, in Nigeria through the principle of the federal character, a principle that aims to ensure fair representation in national institutions, the federal executive must include a member from each state. Parties that compete in national politics must have a national character with a certain level of membership and number of candidates across the country. The president is also required to win a majority of votes as well as secure at least one-fourth of the vote in two-thirds of the states. Kenya has similar provisions in its 2010 constitution. A presidential candidate must win 50% + 1 of the total votes cast

²⁷⁶ Rotimi Suberu, 'Nigeria's Permanent Constitutional Transition: Military Rule, Civilian Instability and the Un Ending Search for Democratic 'True Federalism' in a Deeply Divided Society,' in George Anderson, Sujit Choudhry eds. *Territory and Power in Constitutional Transitions* (Oxford: Oxford University Press, 2019): 188.

²⁷⁷ In Nigeria the presidential candidate is required to win plurality of votes nationwide and a quarter of the votes in at least two-third of the states and the federal capital. See Art 133 of the 1999 constitution.

²⁷⁸ Suberu (n 276): 188.

²⁷⁹ Donald Horowitz (n 32): 180–190.

²⁸⁰ Simeon (n 8): 62.

in an election and at least 25% of the votes cast in more than half of the 47 counties. The appointment of the cabinet should also reflect the regional and ethnic diversity of the people of Kenya.²⁸¹ Political parties that provide presidential candidates are required to have national character and the constitution expressly prohibits the formation of political parties on the basis of ethnicity, region or religion.²⁸²

Yet, in societies with deep divisions, where there is no clear demographic majority (a common concern of all four federations), getting such a selfless, unifying president is a rare possibility. The presidency as a one person institution associated with winner-takes all outcome along with the mandate to make and break the executive and the resources that it commands both formally and informally is rather a divisive institution.²⁸³ The Nigerian and Kenyan presidential elections demonstrate this point. Instead of unifying different communities, the presidential institution remains very divisive bone of contention and cause of electoral violence. The record is simply dismal. Thus some have indicated parliamentary system as preferred option.²⁸⁴

Secondly, where societies are deeply divided as in Ethiopia today, there is no guarantee that the presidential candidate will win across ethno national divides. On the contrary, communities seem to be keen to choose their own candidates. Thus, a presidential system may perpetuate a permanent majority against permanent minority resulting in political frustration and electoral violence as it did in Kenya in 2007. Where there is no clear dominant group it may even result in a permanent minority against permanent minority. 'Politicians from minority groups that occupy a few states/single state or share one with other groups have their guaranteed support confined to that state or a fraction thereof... In a divided society where ethnic categories are the primary lens for viewing conflicts, ethnic minority politicians are hardly accepted outside their home base.'²⁸⁵ Thus

²⁸¹ Article 138 of the 2010 Kenyan constitution.

²⁸² Article 91 of the 2010 Kenyan constitution.

²⁸³ Arend Lijphart (n 34): 101.

²⁸⁴ Juan J. Linz, 'The Perils of Presidentialism,' *Journal of Democracy* 1:1 (1990): 51–69.

²⁸⁵ John Boye Ejibowah, Integrationist and Accommodationist Measures in Nigeria's Constitutional Engineering: Successes and Failures in Sujit Choudhry ed., *Constitutional Design for Divided Societies: Integration or Accommodation* (Oxford: Oxford University Press, 2008): 247.

the presidential system has little to offer to the left outs but rather leaves them to be under perpetual rule of others and it is this sense of isolation that fuels ethno nationalism: why stay in a system that is not theirs?

Thirdly, in the case of Nigeria, integration and territorial manipulation worked because the military imposed it by force but the issue is why would a strongly mobilized territorially concentrated group that feels that the central government is repressive and exclusive, as it was the case for the most part of 20th Ethiopia, consent to such a tool of divide and conquer/rule? The effort by the central government to impose centrist policies in Ethiopia resulted in its liquidation and the regime's demise in 1991. The effort to do the same by the current government has provoked widespread discontent in Oromia, the South and Tigray.

Fourthly, the presidential federal model works where there exist softer, not deep cleavages in which voters are open to support a candidate even outside of their ethnic group cutting across cleavages. As argued by Richard Simeon, federations that adopt integration work better in societies with single dominant culture, softer cleavages and broad variety of minorities in particular when such minorities are dispersed throughout the country rather than territorially concentrated.²⁸⁶ Integration has little to offer to politically mobilized, territorially concentrated ethno national groups.²⁸⁷ The current Nigerian federation is in many ways the making of the military rulers that envisioned a very centralized federal system and many small size constituent units that frustrated the demands of bigger ethno national groups ambition for self-government.²⁸⁸ True federalism by the Yoruba, confederation by the Igbos, high sense of marginalization and demand for resource control from the oil producing Niger Delta (home of the Ijaw) appear frequently in constitutional reform debates.²⁸⁹ Thus cries for reform in the Nigerian federation leading to rotating presidency among the six bigger geo-ethnic regions, demand for 'true federalism,' more power and resource devolution to states have been on the agenda since the return to civilian rule in 1999, although little

²⁸⁶ Richard Simeon (n 8): 63.

²⁸⁷ McGarry, Brendan O'Leary and Richard Simeon (n 271): 51.

²⁸⁸ See for detail Ladipo Adamolekun, 'The Nigerian Federation at Cross Roads: The Way Forward,' *Publius: The Journal of Federalism* 35:3 (2005): 400–403.

²⁸⁹ Isawa Elaigwu (n 44): 91.

progress has been made.²⁹⁰ These are some of the major forces in Nigeria pushing towards federal accommodation and is thus obvious that integration resulting in weak states and strong federal government has not done well to contain cleavages. Thus, Suberu concludes, Nigeria is in unending search for democratic true federalism.²⁹¹ Integration as in Nigeria needs to be flexible to have some accommodative features.

The biggest limitation of the integration model is it skips the most fundamental question and claim by territorially based cleavages: the right to self-government and political autonomy. As its main goal is to limit imperial center, ensure local development and service delivery and diffusing identity based cleavages, it fails on one of the central issues related to the demands by identity based and mobilized groups.

Furthermore, integration assumes a single people (demoi),²⁹² as it is a federation of citizens, not a federation among many mobilized ethnonational groups (*demoi*). Democratic legitimacy rests on the 'people' but defining the people is central to the debate in divided societies. Integration assumes democratic legitimacy comes from a 'single common people.' According to Erk, 'The center and the constituent units are orders of governments of the same nation.'²⁹³ Except citizenship integration is against the 'public institutional recognition of group identities'²⁹⁴ though it may accept diversity in the private sphere (often called soft multiculturalism) and in this respect is not assimilation. In other words, it aims at public *homogenization* through common citizenship.²⁹⁵

Public policies such as education and history, language, media, culture, national symbols, legal system are used as tools to promote single public identity. Public policy also plays a key role in making sub state identities publicly invisible.²⁹⁶ As it is a product of the nation state, it promotes one (national) identity and discourages sub state identities. It pretends

²⁹⁰ John Boye Ejibowah (n 285): 255.

²⁹¹ Suberu (n 276): 181.

²⁹² John McGarry, Brendan O'Leary and Richard Simeon (n 271): 41.

²⁹³ Jan Erk, 'The Sociology of Constitutional Politics: Demos, Legitimacy and Constitutional Courts in Canada and Germany,' *Regional and Federal Studies* 21:4 (2011): 524.

²⁹⁴ John McGarry, Brendan O'Leary and Richard Simeon (n 271): 41.

²⁹⁵ Ibid.: 42.

²⁹⁶ Kymlicka (n 2): 42–43.

to turn blind eye to difference but implicitly and at times explicitly, the culture and identity of the *dominant elite* becomes the 'national' identity. It promotes and nurtures the chosen identity of the political elite that controls power and is thus not inclusive. Identity then becomes a means for inclusion (source of pride) or exclusion (source of subordination and stigma) and tool for mobilization by the left-outs to end their subordinate position. It is 'rooted in the old liberal principle that the individual is the only atom from which to construct and analyse society.'²⁹⁷

The limitations of integration in dealing with groups that are mobilized against the center became clear towards the mid-twentieth century and thus the nation state was forced to reconfigure itself to provide space for sub state entities.²⁹⁸ Thus the UK, Spain, Canada and Belgium had to open up through a renegotiated social contract for the Scottish, Catalan, Quebec and Flemish autonomous subunits.²⁹⁹ One could argue in this sense that it was integration applied in the context of deep cleavages that produced political mobilization. Failed integration thus led to accommodation systems where mobilized ethno national groups in the above countries are by design made majorities at sub unit level to ensure the right to self-government to *groups as entities*. The old liberal model based on the individual had to give in and be reformed to create space for left outs. Federal accommodation in this sense recognizes the individual as well as groups. It organizes and protects both individuals and groups.³⁰⁰ The individual is represented in the elected House of Representatives based on the one-person- one vote principle, accorded citizenship rights while the groups in the second chamber and other federal institutions. The particular type of groups recognized and accommodated in federations as already hinted are territorially based cleavages that demand autonomy, inclusion and at times secession. Deeply divided societies are thus pluri-nations and demand for political recognition and empowerment of many nations, not one nation in the country. According to Erk, 'Democratic legitimacy is based on the union between

²⁹⁷ Daniel Elazar, *Federalism and the Way to Peace* (Kingston: Institute of Intergovernmental Affairs, 1994): 4.

²⁹⁸ See for details Kymlicka (n 2): 61–62.

²⁹⁹ Watts (n 19): 76.

³⁰⁰ Hueglin and Fenna (n 135): 25; also Kymlicka (n 2).

multiple *demoi*. And not every constituent nation sees the union in identical terms. For English speakers, Canada is a federation of ten provinces; for French speakers, it is a union of two nations.³⁰¹ The center and the constituent units are orders of governments of different nations. There is thus competing views on the nature of the union and the source of democratic legitimacy owing to multiple *demoi*. Thus, unlike integration, accommodation promotes dual or multiple identities and public policy as well aim to achieve the same goal. In the presidential federal model, the goal is to construct *one people out of many* and by design prevents ethno-national groups from becoming constituent unit majorities and thus denies the group self-government right.³⁰² In other words, it does not ensure group self-government at sub state levels.

In Ethiopia, owing to the coerced state formation process towards the end of the nineteenth and early twentieth century and the subsequent failure by the centrist elite to address ethnic based marginalization, the bigger ethno national groups established national liberation fronts and brought the central government to its knees in 1991. Since 1991, they have exercised limited political autonomy and continue to demand more, not less autonomy. One could state the level of ethno national based mobilization in Ethiopia is a record within the African context. The center has had difficulty comprehending this fact and often fails to design appropriate institutions and policies to address their concerns. A return to centralization or shift to a strong presidential system with weaker states and any effort to break down already mobilized ethno national groups to pieces ending group based rights could therefore risk the speeding up of the country's collapse. It was the effort to centralize on the part of the central government in a context of mobilized ethno national based states that triggered the collapse of communist federations.³⁰³ In an interesting parallel, PM Abiy and *Ezema* leaders' determination to shift towards a presidential and centralized federation at least during the first two years of Abiy's term was thus a very risky choice and has aggravated war and tension in many parts of the country.

South Africa and Kenya partly share some features of integration and to some extent explain the constitutional design options adopted in their

³⁰¹ Erk (n 293): 524.

³⁰² McGarry, Brendan O'Leary (n 158): 8.

³⁰³ Ibid.: 11.

respective constitutions. Both countries are characterized by ‘politically salient cleavage that are both territorial and non-territorial and the issue of territorial accommodation is part of a larger constitutional agenda that may be offset by other claims.’³⁰⁴ In South Africa, the white minority is territorially dispersed, while the different linguistic groups, although to some extent found geographically concentrated, have rather been mobilized as united entities by the ANC against colonizers and the Apartheid regime. Despite linguistic differences, the idea of black majority is still alive. The groups are also internally less cohesive. Zulu nationalism has over the years lost to ANC even in its home province.

In Kenya, ethnicity is more visible compared to South Africa but has not transformed itself into a national liberation front the way it has in Ethiopia. The political elite has yet to ensure ethnic and regional equality but does to some extent exhibit tendency for modest elite bargain when the political temperature rises. The power sharing arrangement between the two major protagonists following the election crisis in 2007, and the magic handshake between Kenyatta and Odinga following the election crisis in 2017 are recent examples. Yet this has remained ad hoc and, unless it is institutionalized (hence the argument for divided executive and parliamentary system), it could transform and harden identity-based politics. As witnessed in the successive elections, presidential elections are fought along ethnic lines based on ethnic coalitions than on ideological basis and at times lead to deadly conflicts and thus devolution has not diffused ethnic conflicts. It is too early to tell but opposition victory in several counties including governorship positions has however provided the opposition an opportunity to become a winner at the county level.

4.4.2 *Accommodation and Power Sharing*

For countries with deep divisions where ethno-national groups are politically mobilized and identity is politically salient, the two well-recognized alternatives, depending on whether the cleavage is territorially grouped or dispersed, are power sharing and accommodation within a federation or a combination of both.³⁰⁵ Thus institutional design is not done in the abstract, it is a reflection of the social and political forces that shape the institutions.

³⁰⁴ Anderson and Choudhry (n 12): 380.

³⁰⁵ John McGarry, Brendan O’Leary and Richard Simeon (n 271): 51.

First briefly about power sharing as it could exist separately in a polity that is not a federation (example the Netherlands and Kenya following the 2007 election crisis). A federation could also exist without embracing power sharing espousing majoritarian democracy as in India, Nigeria and Ethiopia. The works of Arend Lijphart³⁰⁶ and of late O'Leary and McGarry³⁰⁷ have articulated the various elements of consociational as opposed to majoritarian democracy. The essence of this approach has been Lijphart's long held observation: stability despite deep divides in some countries such as Switzerland, Belgium and Netherlands associated with consociational democracy. According to Lijphart 'Power sharing denotes the participation of all significant communal groups in political decision making especially at the federal executive level.'³⁰⁸ One should note as well that in the countries where power sharing has been applied, the segmental groups are found intermixed as is the case in Northern Ireland between the Catholics and Protestants. The segments are politically mobilized but unlike the territorially based cleavages that demand self-government, the segments do not have territorial base. They are found scattered and dispersed. While earlier on, the focus was on corporate representation before elections taking the segments as given (predetermined), liberal consociationalism has modified it a bit and the power sharing scheme of major political actors follows democratic election thus opening the system to competition.³⁰⁹ Unlike integration that prefers a presidential system, power sharing is associated with a parliamentary system that is suitable for power sharing arrangement in the executive often in combination with proportional electoral (PR) system. A parliamentary coalition is certainly more inclusive compared to the one person office of the presidency. As argued by Lijphart, it is a flexible arrangement that aims to ensure broad based representation and inclusion of

³⁰⁶ Lijphart (n 245): 499.

³⁰⁷ John McGarry and Brendan O'Leary, *The Northern Ireland Conflict: Consociational Engagements* (Oxford: Oxford University Press, 2004): 1–51.

³⁰⁸ Lijphart (n 34): 97.

³⁰⁹ See Stefan Wolff, 'Managing Ethno-national Conflict: Towards an Analytical Framework,' *Common Wealth and Comparative Politics* 49:2 (2011). The limitations of consociationalism are well known: elitist political arrangement that has the risk of freezing the segments and is often exposed to collapse (government of crisis) when the coalition crumbles, Belgium being a classic example. Yet, the alternatives are very limited as such polities are deeply divided making majoritarian democracy nonstarter. See Donald Horowitz (n 16).

all major actors in decision making and could be on equal or proportional basis. In Belgium there is equal representation of the Dutch and French speaking communities in the executive. In South Africa (1994–1999) all parties that won five percent threshold to the legislature had the right to be represented in the cabinet. The executive power may be divided and shared as was the case in Kenya between Kibaki and Odinga following the 2007 election crisis and the rest of the cabinet shared between rival parties. It could also take the Swiss type where all communal groups are conventionally represented in the collegial executive and the presidency rotating among the seven members annually.³¹⁰ The inclusion of the major political actors in the political institutions either through a proportional electoral system or on equal basis along with representation of the different groups in public institutions is thus the core feature of power sharing. Power sharing, unlike federalism, often takes non-territorial form.³¹¹ In other words, it is often recommended for societies that are deeply divided by identity differences, but the groups are found to be geographically intermixed. Through a combination of power sharing that enables them to influence policymaking at the center and autonomy that entitles them to decide issues related to language, education, and culture, the groups are believed to contribute to political stability. Power sharing could thus remain short of federalism so long as there is no territorially based cleavage demanding political autonomy and self-government.

One could not rule out the relevance of power sharing in the federations under discussion given the fact that none of the ethno-national groups taken alone constitute a ‘50 plus 1’ majority. Indeed, all the African federations under study are countries of minorities. Even in Nigeria’s estimated population of 200 million and no less than 400 ethno linguistic groups, three of them (Hausa-Fulani, Yoruba and Igbo are estimated to account 60% of the total population but none is large enough to claim a majority.³¹² Same goes to Kenya. O’Leary has argued that in a context where there is no *staatsvolk* (a dominant group that enjoys absolute majority and hence has the demographic advantage), political instability will prevail unless there is an inclusive political system that

³¹⁰ Lijphart (n 34): 99.

³¹¹ John McGarry, Brendan O’Leary and Richard Simeon (n 271).

³¹² John Boye Ejibowah (n 285): 234.

brings the major political actors to power.³¹³ The solution he proposed is to have an executive power sharing among the major political actors. While in all four federations there is an effort to have an inclusive federal government, in reality the federal government is *perceived* as belonging to one dominant group and thus continues to face legitimacy crisis. Left outs continue to threaten the central government. For instance, since the establishment of the Ethiopian federation, both as a result of constitutional principle (article 39(3)) and practice, there has been an attempt to reflect the country's diversity in the establishment of the executive. The issue, however, is representation meant for some only in the nominal and not real sense. The two coalition members of the ruling party that led the Oromia and Amhara regional states in particular faced serious legitimacy crisis until recently and thus a section of the Oromo and Amhara used to think they were not genuinely represented in the federal institutions; hence the narrative of marginalization and protests since 2015.

In nearly all African federations and this includes Ethiopia as well, the federal principle of representation has never been genuinely implemented. Representation of sub units in federal institutions is mainly in the second chamber, federal executive, judiciary, the army and security. Yet inclusive and broad based federal government remains a scarce commodity explaining what Steytler and de Visser calls 'the fragile nature'³¹⁴ of the federations as they face threats of fragmentation and secession. Not inclusive federal government in a divided society means it is perceived as belonging to some and not all and with it comes legitimacy crisis explained earlier. To stay in power, federal government resorts to brute force. The constitutional clauses contain some element of representation. Nigeria has the 'federal character' (Article 4 sub 4), Kenya 'institutions should manifest Kenya's diversity' (Article 91), Ethiopia the right to equitable representation of nationalities (Article 39 sub 3) in federal institutions. However, the representation becomes more symbolic than

³¹³ Brendan O'Leary, 'An Iron Law of Nationalism and Federation? A Neo-Diceyan Theory of the Necessity of a Federal Staatsvolk, and of Consociational Rescue', *Nations and Nationalism* 7:3 (2001): 273.

³¹⁴ Nico Steytler and Jaap de Visser, 'Fragile Federations and the Dynamics of Devolution,' in Francesco Palermo, Elisabeth Alber eds., *Federalism as Decision Making: Changes in Structures, Procedures and Policies* (Brill: Nijhoff, 2015): 79. Fragile federations emerge or aim to prevent fragmentation. Unlike older and developed federations, the unity and territorial integrity of the state cannot be assumed but faces demand for negotiation from territorially based cleavages.

genuine. In many cases it is the federal government that handpicks the 'representatives' instead of leaving the matter for the subunits to designate their genuine delegates in the federal institutions. This has been a major paradox in Ethiopia for example as the 'representatives' do not have legitimacy in the eyes of the people of the states.

Second chambers take a special role in representing states in the law making process at federal level and in airing out their voices. This is particularly critical when the federal government designs law and policies that may affect the interest of the states. In addition to airing their concerns, constituent units can also block the other house when it exceeds its mandate and impacts their autonomy. The second chamber thus safeguards the interests of the states. The basic principle that guides federations is that irrespective of their population size, the states are represented on equal basis. Thus in Nigeria, there are two senators from each state while in Kenya, each county has one representative in the Senate. In South Africa, each province has ten representatives in the National Council of Provinces. Ethiopian House of Federation is distinct in two respects: it has no law making function but has wide powers in resolving intergroup conflicts although in reality it is least explored because its members are not full time. It also enjoys wide powers in the allocation of subsidy that the federal government allocates to the states- the main source of states revenue. Secondly the representation is not based on equality. It is majoritarian house where each nationality has one seat but for every additional one million, there is one more seat. The fact that states in Ethiopia have no law making functions means that the federal government can easily enact laws that affect autonomy of states and in the absence a constitutional court that impartially umpires intergovernmental disputes, the system leaves states at the mercy of the federal government.

The experiences in Nigeria, Kenya and South Africa are relevant in this regard. The states have a role in the law making process at federal level and they all have either a constitutional court (South Africa) or Supreme Court (Kenya and Nigeria) to address intergovernmental disputes in an impartial manner. Institutions that enforce the supremacy of the constitution, the rule of law and that umpire intergovernmental disputes impartially are indeed vital preconditions for the operation and development of federations.³¹⁵ These institutions give life to the powers

³¹⁵ Ibid.: 99.

allocated to the two levels of governments and thereby allow the federation to evolve within bounds. Such institution keeps the federation on balance and gives concrete meaning to the division of powers. In Africa, political power is yet to be tamed and institutionalized. The big man or the dominant party at the center is a major obstacle to federalism, power sharing and separation of powers. Independent institutions such as supreme courts or constitutional courts play vital role in limiting power and in institutionalizing it. South Africa and Kenya have gone some steps but Ethiopia is far behind in this respect and the federation has largely been open to political manipulations.

It is vital to mention that successful federations that have politically mobilized cleavages often combine federalism with power sharing. Groups often are found at times intermixed and in other places geographically concentrated. Thus, combining the two offers an ideal solution. It is for this reason that the late Elazar argued that consociational federations are best fit for divided societies.³¹⁶ The Swiss and Belgian federations are in many ways consociational. Compared to presidential centripetal federations, consociational parliamentary federations bring the major political actors to the executive and parliament and minimize the risks of winner takes all associated with presidential systems. As it often leads to coalition government, the system needs consensus based process of decision making to avoid government collapse and that is an incentive for elite bargain.³¹⁷

The highest form of accommodating ethno nationalist groups particularly when they are found territorially concentrated and are politically mobilized is through consociational federalism.³¹⁸ The accommodation approach takes 'divisions' seriously and does not aim to abolish or weaken them but recognize them and turn them into constitutive elements of democracy and empowerment. When combined with federalism, it treats 'the segmented elements' as building blocks of political engagement and aims to make the ethno-national group to become a majority at constituent unit level.³¹⁹ While Switzerland and Canada were pioneers

³¹⁶ Daniel Elazar (n 297): 57.

³¹⁷ The limitation of coalition based governments is well known. See Lijphart (n 245) for details.

³¹⁸ See McGarry, O'Leary, and Richard Simeon (n 271): 63.

³¹⁹ Kymlicka (n 2): 69.

in this respect, Kymlicka argues, the idea of ensuring self-government to territorially concentrated national minorities is now universal in the west.³²⁰

The above arrangements are also called post-conflict or post-modern federations and exhibit some common features.³²¹ Unlike the classic coming together federations often with symmetric power enjoyed by sub units, accommodative post-modern federations are holding together federations where previously unitary state decides to transfer political, economic and administrative powers to newly established sub-units in response to demands from politically mobilized identity based cleavages that constitute a majority in the provinces/states (Spain, Canada, Belgium, UK, Ethiopia). The agenda for self-government and at times secession is pushed by regionally or provincially based ethno national party and the center may involve formal or informal asymmetry. Not all provinces or states make same claims and the center adopts a flexible and negotiated response to the demands and often takes asymmetric form. If it works such a negotiated political arrangement that ensures political autonomy to territorially based cleavage is constructed as alternative to conflict and secession. This dispensation remains the most significant development in federal and constitutional discourse since 1970s. Significant because short of secession and having one's new nation state, this institutional arrangement grants ethno national and regional minorities the right to self-government with the widest possible political autonomy to decide political, economic, linguistic and cultural matters at constituent unit level. It is the *highest form of internal self-determination* an ethno national or regional group could find within a pluri-national federation. In some cases (see chapter three and the section on power sharing), it is combined with robust system of representation at federal level to allow such groups to influence and have a say in the country's overall public affairs. To give this concrete effect it may be combined with consociational power sharing where major country wide issues are discussed on

³²⁰ Ibid.: 69–70. He mentions the Aland Island, South Tyrol, Catalonia, Flanders, Scotland and Wales (devolution), Quebec. All groups over 250,000 that assert self-government have now been granted in the west.

³²¹ Greg Marchildon, 'Post-Modern Federalism and Sub State Nationalism,' in Ann Ward and Lee Ward eds., *The Ashgate Research Companion to Federalism* (Burlington: Ashgate Publishing Company, 2009): 442.

consensus as in Switzerland and Belgium.³²² Given that the cost of maintaining unity and territorial integrity in Ethiopia has become so high at times resulting in ethnic cleansing and genocide and some ethno national groups are pushing for secession, major decisions at the center should be made jointly and by consensus with regional states. In the long run, more power and resources need to devolve to regional states. The role of the center should be more symbolic and that way the stakes at the center could be lowered. In the short run, robust system of representation and consociationalism at the center, if implemented whole heartedly could build the sense of belongingness and inclusivity to the overarching state, critical element in polity building.

As Livingston long articulated, the essence of federalism is not in the constitution or the institutions alone but in the social and political diversity that necessitates the adoption of federalism.³²³ The geographic distribution of diversity and its political mobilization remains a vital factor. If mobilized, ethno-national groups are found concentrated in a certain defined area then ethno national federalism remains the relevant alternative. Unlike the integrationist presidential federations ethno national parliamentary federations aim to empower such groups by redrawing territories to ensure that they become a majority at sub state level. Ethno national minorities challenge the coercive process of state formation and the subordinate relationship they have with the center. They assert a national identity whose goal is to ensure self-government within a defined territory and thus the relationship between groups and territory becomes critical.³²⁴ Self-government is intrinsically linked to territory. At the core of the mobilization is to address political, economic deprivation and regain collective self-esteem ending their subordinate relations with the elite that controls the center.³²⁵ Their claims may extend to include right to exit, while the center wants to ensure unity and territorial integrity

³²² Susanna Mancini, 'Rethinking the Boundaries of Democratic Secession: Liberalism, Nationalism and the Right of Minorities to Self-Determination,' *International Journal of Constitutional Law* 6:3-4 (2008): 576.

³²³ William Livingston, 'A Note on the Nature of Federalism,' *Political Science Quarterly* 67:1 (1952): 81.

³²⁴ Sujit Choudhry and Nathan Hume, 'Federalism, Devolution and Secession: From Classical to Post Conflict Federalism,' in Tom Ginsburg and Rosalind Dixon eds., *Comparative Constitutional Law* (Cheltenham: Edward Elgar 2011): 363.

³²⁵ Ibid.: 364.

of the state. Political autonomy within a defined territory as part of the political system is thus a middle way solution to the competing claims of the center and the sub units.

Unlike the presidential federal model, ethno national based federations do not aim to nurture one identity but recognize more than one public identity. Public policy thus promotes multiple, not single identity. Managing mobilized ethno national diversity and ensuring the right to self-government remains the major task of the federal design. Through its combination of constitutionally entrenched division of power as well as the principles of shared rule and self-rule,³²⁶ it allows mobilized groups to enjoy political autonomy at subunit level while ensuring representation at federal level. Through the institutions of shared rule and representation in federal institutions, ethno-nationalist groups are given the opportunity to influence decision-making at the center. The logic of this form of federalism is that ethno-nationalist groups can only respect the institutions of governance and thus contribute to stable federation when they are granted a satisfactory combination of *influence* at the center and *meaningful autonomy* at the sub state level with regard to their own affairs.³²⁷ As practised in the Swiss collective presidency of the federal executive, Canadian and Belgian executive by convention or constitutional principle, the different identities have a guaranteed representation in key decision making institutions at federal level.³²⁸ In Canada, Quebec has guaranteed representation even in the Supreme Court and that ensures that Quebec's rights and interests are not infringed upon. This somehow determines whether ethno-nationalist groups will remain loyal to the overarching federation or will prefer to fight or walk away from it. As it recognizes more than one public identity (at the federal and sub state levels) and aims to secure coexistence among them, it remains a key instrument for polity building and managing diversity.

The limitations of the accommodationist approach are well known. It is argued by experts' it institutionalizes divisions, deepens the fault lines that

³²⁶ Daniel Elazar (n 5): 12.

³²⁷ Lijphart (n 245): 500.

³²⁸ John McGarry, Brendan O'Leary and Richard Simeon (n 271): 61. In the Belgian federation, the Dutch and French speaking communities are represented equally in the federal government.

is meant to address and may aggravate conflicts.³²⁹ Experts warn such arrangements reinforce, not alleviate the cleavages, they provide ethno national groups with the resources needed to mobilize and challenge the territorial integrity of the state facilitating fragmentation. However, the alternatives are also very limited. In the first place, in deeply divided societies it is because the cleavages are already deeply entrenched and mutually reinforcing that accommodative approaches are introduced to prevent the next step: protracted conflict, secession and state fragmentation. Power sharing and ethno national based federations are 'put in place where other institutional options have failed'³³⁰ or are not available. As argued by Liam Anderson, the choice is between ethno national federation and nothing: 'Ethnically defined political systems may be the worst form of government for divided societies, but they may still be better than all those others that have been tried.'³³¹ In the menu of options, it is the last resort (because other options have been tried and failed) before break up or state failure. Indeed the strength of ethno national based accommodation rests in the absence of viable alternatives.

More importantly, one has to carefully analyse the data on failures and the successes. Most of the arguments and data against ethno national federations come from failed federations such as former USSR and Yugoslavia. Yet there are multinational and multi-ethnic federations such as India, Belgium, Canada and Switzerland among others that have not only survived but continue to prosper. If the data and analysis is expanded then the successes may outweigh the failures. Indeed Liam Anderson argues:

³²⁹ Horowitz (n 16): 15–37; See also Philip Roeder, 'Ethno-federalism and the Mismanagement of Conflicting Nationalism,' *Regional and Federal Studies* 29:2 (2009): 203–219. Others add identity is fluid and cannot serve as an organizing principle in a federation; redrawing the boundary of constituent units neatly is an impossible mission and thus result in intra-unit minorities (cartographic problem); it is dysfunctional system that faces deadlocks and ethnic outbidding. Liam Anderson, *Federal Solution to Ethnic Problems: Accommodating Diversity* (London: Routledge, 2013): 16; 34.

³³⁰ Liam Anderson, 'Ethno Federalism and the Management of Ethnic Conflict: Assessing the Alternatives,' *Publius: The Journal of Federalism* 46:1 (2015): 3; 16. He also wrote, 'deeply divided societies, where cross-cutting cleavages that transcend ethnicity cannot simply be created out of thin air, system stability can best be obtained by minimizing contact among groups, giving them the institutional means to protect their autonomy, and relying on elites to cooperate at the center.' Liam Anderson (n 329): 16.

³³¹ *Ibid.*: 70.

‘The bulk of the evidence used by critics is drawn from studies of a small number of high-profile failures of ethno-federal systems – most frequently, the Soviet Union, Yugoslavia and Czechoslovakia. But to conclude from this that ethno-federal systems are destined to fail is logically invalid, without knowing what proportion of the total these three cases represent. Studies show, in fact, that using a broad definition of the term “ethno-federation” (that includes ethnic autonomy arrangements) between 40 and 45 ethno-federations have existed since 1945. Of these, 10 have failed, in the sense that they suffered secessions from one or more of their constituent ethnic units. Thus, the failure rate of post-1945 ethno-federations is about 25 percent – equating to a success rate of 75 percent.’³³²

Two further points provide a better picture here: the failure cases were not genuine, nor were they democratic as they operated under tight communist one party rule. The failure could indeed be attributed to authoritarianism than to the federation itself. The success ones show constitutional commitments to the federal pact and often there is an impartial body that enforces it when either level of government violates the deal. They are federations supported by constitutionalism. The success cases are also democratic. The success is thus attributed to the federal pact and political will to enforce it, constitutionalism and democracy.³³³ Thus success or failure of ethno national federations depends on whether those pacts are genuinely implemented and are bound by rule of law/constitutionalism and whether the system is democratic or not.

There are also other mechanisms to mitigate some of the limitations of this approach. It is rare that a subunit will become a homogenous unit and mobilized ethno national groups that constitute a majority at sub unit level could tend to be local tyrants and abuse right of minorities and thus need institutional guarantee to ensure citizenship and minority rights throughout the federation.³³⁴ One should note in the countries that recognize group rights (such as Canada, UK, Belgium) by adapting their respective constitutions to provide space to hitherto marginalized groups, group right and autonomy came to broaden the scope of human

³³² Ibid.: 248.

³³³ Ibid.: 248.

³³⁴ See for details Assefa Fiseha, ‘Intra unit Minorities in a context of Ethno National Federation in Ethiopia,’ *Utrecht Law Review* 13:1 (2017).

right protection, not to limit them. They already had a well-protected individual rights system way before their constitutions were adjusted to grant autonomy to deeply mobilized cleavages. Yet the individual rights system was found not enough. Representation and autonomy was added to the already well entrenched individual rights system; it came to reinforce, not to weaken it. In most African federations, this is a major concern as the record on citizenship rights is dismal and group rights continue to threaten the already weak individual rights.

The post 1991 Ethiopia's federal experience is text book example that shows the above limitations. Under EPRDF's tight rule and state led economic growth, Ethiopia was able to ensure relative stability and fast economic growth with massive investment in basic services such as education, roads and health. With the change of leadership in 2018, the weaknesses, paradoxes, the frequent use of violence, emergence of informal forces as agents of regional states, countless horizontal and vertical conflicts as already noted resulted in deinstitutionalization, fragmentation and the obliteration of regional state autonomy. Critics have since long aired their concern stating that the Ethiopian federal system by empowering ethno national groups to self-rule and by providing resources, security forces, and the media at their disposal may weaken common ties.³³⁵ Federalism is about, in the words of David Miller, 'nesting identity'³³⁶ through federalism—an identity that is aware of itself unleashed by self-rule but is also about becoming aware of the identity of others, respecting, recognizing, and having positive interaction with them as well. It assumes intergroup interaction to build cohesion among groups.³³⁷ It is not about non-interactive existence of parallel and segregated identities. It is also about the coexistence of multiple identities where two or more identities feel as belonging *both* to the smaller (sub state) community and to a larger and overarching political community and they do not think that both are mutually exclusive. Yet the Ethiopian federal system lacks a comprehensive policy for nesting diversity and for

³³⁵ See Mahmood Mamdani, *The Trouble with Ethiopia's Ethnic Federalism*, New York Times 3 January 2019, <https://www.nytimes.com/2019/01/03/opinion/ethiopia-abiya-ahmed-reforms-ethnic-conflict-ethnic-federalism.html>.

³³⁶ David Miller, 'Nationality in Divided Societies,' in Alain Gagnon & James Tully eds., *Multinational Democracies* 304 (Cambridge: Cambridge University Press, 2001).

³³⁷ See Kymlicka (n 260).

creating cohesion among them. Strong institutional protection of individual rights through autonomous judiciary, ensuring fair and genuine representation of minorities at different levels of governments, reforming the second chamber to engage in law and policy making, establishing a constitutional court as guardian of the constitution could mitigate some of the current weaknesses of accommodation and enhances social cohesion by encouraging free movement of people across the federation. Accommodation thus needs to manifest some element of integration.

4.5 CONCLUSION

The chapter has investigated whether the nature of the cleavage matters and impacts institutional design. By comparing the four federal and devolved systems it has argued that the nature of the cleavage and its level of mobilization matter and has effect on institutional design. Depending on the nature of the cleavage and level of mobilization distinct institutional arrangements are needed to manage the cleavage and reduce conflict. Less mobilized cleavages as in South Africa can be managed through integration while more mobilized and territorially based cleavages can be managed through accommodation. Yet, at the end of the day, political reality would dictate constitutional designers to be flexible and combine a mix of accommodation and integration and rightly so. As in Ethiopia nesting identity through strong protection of individual and minority rights remains vital to ensure social cohesion, unity and common citizenship. In Nigeria and Kenya, there is growing concern that the cleavages may deepen further unless accommodation policy is employed to provide political and identity space for sub state nationalism and minimize political mobilization based on identity. Integration has not been able to respond to strongly mobilized groups in Nigeria and Kenya and failed integration policy can slowly fuel ethno nationalism resulting in more radical demands. In South Africa, despite an integrationist design, the proportional electoral and parliamentary systems have promoted political inclusion that alongside the other factors (middle class and black majority) have moderated cleavages.

As a result of coercive nation building process that liquidated quasi autonomous kingdoms and failure by successive regimes to respond to demand for accommodation, the number of national liberation fronts in Ethiopia is a record within the African continent. The left-outs from the nation building process have continued to challenge the center. The

debate between the centrist elite and the left-outs is Ethiopia's major political paradox that makes the country very fragile. To its credit PP has conceded to long awaited demands for self-government in the South resulting in four new states. Yet except the Sidama, the 'clustering system' is not only top-down but replicated EPRDF era policy in the South and thus continue to face challenges in Wolyta and Guraghe among others. We noted already how an otherwise generous power that ensures self-government was curtailed by democratic centralism, hegemonic party and centralized policy making under EPRDF and extreme centralization, martial law, deinstitutionalization and violence under PP. In comparison with the other federations under discussion, two points further complicate Ethiopia's political context. The extreme centralization of power at the center and the brute use of force to deal with political issues was an incubator to the ethno national based liberation fronts that emerged in the early 1970s. In addition, the failure to dialogue and make compromise to resolve political issues characterizes modern Ethiopian politics. It is hard to find something comparable to the political settlement in post-apartheid South Africa or Kenya's post 2007 political deal following the election crisis. Entrenched, territorially based and politically mobilized cleavage is the outcome. The distinct and radical nature of the post 1991 Ethiopia's federal system in its determination to address the nationality question albeit with limited implementation was an effort to address this issue. A generously granted autonomy of states has been curtailed by centralizing and hegemonic party during EPRDF and now by personal rule and 'command posts.'

The nature of the cleavages and level of political mobilization in the four major federal and devolved systems differ and has impacted the respective constitutions. Certainly cleavage alone does not explain but remains a prominent factor. As a result, some of the federations have chosen accommodation and others integration. Two of the distinct institutional accommodationist arrangements that fit a politically articulate territorially based cleavage are power sharing and consociational federation that ensures self-government and fair representation. The central government in each of the countries under discussion continue to be perceived very thin in terms of legitimacy and lack of inclusion albeit to varying degrees. At its core is the fact that each country is composed of collection of ethno national minorities, none of them taken alone commanding a majority. Majoritarian based democracy in deeply divided societies become source of problem than a solution and thus the need for

other inclusive options. It becomes a clash between a minority that has state resources at its disposal trying to impose its will on another minority. Yet even if the central government's project of nationalism enjoys a majority, it pits a permanent majority against a permanent minority and the latter has no hope of becoming a majority. With it comes the issue of why would an ethno national minority under perpetual rule of injustice be expected to be loyal to such regime and stay in the union. The general assumption of majoritarian democracy that the rulers alternate during election in that today's majority will become tomorrow's minority does not hold true in deeply divided societies. In this context the institutions as well suffer from legitimacy crisis. The decisions of the majority are not accepted by the minority. The values promoted by the center such as the flag, the national anthem, public policy, the media, language and cultural policies that are instruments of centralised nation building are deeply resented and rejected by the ethno national minority and regional groups. Thus alternative theories such as consociational democracy are recommended when the political system faces deeply divided cleavages. Instead of having winners and losers, consociation democracy brings major political actors either on equal or through proportional arrangements to power and insists on consensus decision making on fundamental issues. Thus left outs in the majoritarian democracy become decision makers through power sharing, reducing the potential for conflict. Distinct institutional arrangements thus matter in managing cleavages and reducing conflicts.

The second distinct institutional feature that deeply divided societies with territorial cleavages need is political autonomy and representation. Unlike the integrationist presidential federations that disperse power into many centers, ethno national parliamentary federations aim to empower such groups by redrawing territories to ensure that they become a majority at sub state level so that it will exercise meaningful political autonomy and self-government while at the same time ensuring representation in the federal institutions. Ethno national minorities challenge the coercive process of state formation and the subordinate relationship they have with the center. They assert a national identity whose goal is to ensure self-government within a defined territory and thus the relationship between groups and territory becomes critical. While in integration the cleavages are deliberately subdivided into several sub units, in accommodation the cleavages think such an approach is a ploy to divide and rule and insist on having a constituent unit that ensures them to have a

majority and territorial control where they exercise territorial and political autonomy and decide their own affairs. Compared to presidential centripetal federations, consociational parliamentary federations bring the major political actors to the executive and parliament and minimize the risks of winner takes all associated with presidential systems. As it often leads to coalition government, the system needs consensus based process of decision making to avoid government collapse and that is an incentive for elite bargain. Mobilized ethno national group that feels less represented in federal institutions has little incentive to stay in the union unless it is assured of some level of influence or even a veto at the center. To minimize the growing mistrust between the federal government and regional states and build trust, indeed key decisions that affect the country and the regional states need to be decided by a consensus between federal government and regional state leaders. Certainly power sharing has limitations as it may at times result in government of crisis yet the choice for countries such as Ethiopia is between fragmentation and never ending tension and war or possibly durable, more inclusive and slow but consensus based decision making process. If securing durable peace and inclusion are main objectives, the benefits could outweigh its limitations.

In Kenya, Nigeria and South Africa the choice had been diffusing cleavages. While Kenya's provinces more or less coincide with the major ethnic groups, the new constitution does not grant any powers to provinces. The devolution is based on the county level. Similar to the logic of Nigerian and South African integration federation, larger ethnic groups in Kenya do not have ethnic homelands at county level. The county boundary divides the larger ethnic groups into several counties. It does not take the ethnic/religious based provinces as building blocks during political engagement but rather breaks them into smaller units. Furthermore while the constitution outlines broader objectives of devolution (Article 174) that includes limiting imperial presidency, ensuring development and ethnic harmony and reducing conflicts, the overall design of devolution shows major focus on development and service delivery and less on ethnic accommodation. In the three federations, the overall logic is thus it is easier for the national government that commands vast power to manage many smaller size states than small number of bigger size provincial based strong ethnic or regional groups.

Another major observation is that unlike Ethiopia, Kenya and South Africa do not have well organized ethno national based liberation fronts

and thus the territorial integrity and unity of the state has never been put to test. The Zulu of South Africa or Maasai, Coastal people and the North East of Kenya are exceptions and not comparable to the TPLF, OLF and ONLF of Ethiopia, not to mention Eritrea (before its secession in 1993). The nature of the ethno national cleavage in Ethiopia is highly mobilized and indeed by 1991, this force has brought major state restructuring since then. Ethiopia in the eyes of the ethno national based liberation front is result of a coercive nation building process which if it does not allow major political space at regional state level and fair share at federal level could result in many new nation states. The nature of the cleavage and its level of mobilization is thus one major factor that affects institutional design and the dynamics of the federation or devolution. Even at a formal level, while South Africa and Kenya are not comfortable to call themselves federal hence employ a more neutral name devolution, in Ethiopia, ethno national liberation fronts think federation is not enough. They seek more transfer of political and fiscal power to the regional states along the lines of confederation and by doing so make the stakes at the center low. National liberation front's as well take pride in naming their regional states along the major ethno national groups as an indication of entitlement to constitutionally protected self-rule. One cannot say the same in Nigeria, South Africa and Kenya where the major focus has been 'recognition of diversity without empowerment.' The Nigerian, South African and Kenyan constitutions focus on national integration and unity and there in underlying fear that differences need not be institutionalized or entrenched through federalism or devolution. Federalism or devolution should rather aim to diffuse it. In other words, it is federalism and devolution for development, service delivery and ending 'imperial presidency' by dispersing political power in many centers. Kenya's 2010 constitution with its 47 counties each with directly elected governor and senators primarily aim at transforming the country's politics by reducing the high politics in the office of the presidency. Yet, the presidency, the resources that it commands along with the winner takes all made it so divisive as witnessed in the 2007 and 2017 elections. It was less violent in 2013 elections as the opposition at national level has won majority in no less than half of the counties and governorate positions and thus become a majority at country level. Thus accommodation and empowerment of ethno national minorities is not the primary objective of the system, diffusing power is.

South Africa and Kenya partly share some features of integration and to some extent explains the constitutional design options adopted in their

respective constitutions. Both countries are characterized by politically salient cleavages that are both territorial and non-territorial and the issue of territorial accommodation is part of a larger constitutional agenda that may be offset by other claims. In South Africa, the white minority is territorially dispersed while the different linguistic groups though to some extent found geographically concentrated have rather been mobilized as united entities by the ANC against colonizers. Despite linguistic differences, the idea of black majority is still alive. The groups are also internally less cohesive. Zulu nationalism has over the years lost to ANC even in its home province.

In Kenya, ethnicity is more visible compared to South Africa but has not transformed itself into a national liberation front the way it is in Ethiopia. The political elite has yet to ensure ethnic and regional equality but does to some extent exhibit modest elite bargain when the political temperature rises. The power sharing arrangement between the two major protagonists following the election crisis in 2007, and the magic handshake between Kenyatta and Odinga following the election crisis in 2017 are recent examples. Yet this has remained ad hoc and unless it is institutionalized could transform and harden identity based politics. As witnessed in the successive elections, presidential elections are fought along ethnic lines based on ethnic coalitions than on ideological basis and at times lead to deadly conflicts and thus devolution has not diffused ethnic conflicts.

In Nigeria and Kenya in particular, integration has increasingly been questioned and softer form of mobilization has frequently called for accommodation and more transfer of power to sub units. The current Nigerian federation is in many ways the making of the military rulers who envisioned a very centralized federal system and many small size constituent units that frustrated the demands of bigger ethno national groups ambition for self-government. Failed integration can deepen cleavages and shift the gear towards accommodation. True federalism by the Yoruba, confederation by the Igbos, high sense of marginalization and demand for resource control from the oil producing Niger Delta (home of the Ijaw) appear frequently in constitutional reform debates. Thus cries for reform in the Nigerian federation leading to rotating presidency among the six bigger geo-ethnic regions, demand for 'true federalism,' more power and resource devolution to states have been on the agenda since the return to civilian rule in 1999 although little progress has been made. Certainly these are some of the major forces in Nigeria pushing

towards federal accommodation and it is thus obvious that integration resulting in weak states and strong federal government has not done well to contain cleavages but has not led to open wars as in Ethiopia. Nigeria is in unending search for genuine federalism with some powers transferred to states.

All in all however, the federal and devolved systems manifest centralizing features. This is a puzzle but explains one of the core features of federal and devolved systems in Africa, compared to those in the west. Differences in the nature of cleavages and their level of political mobilization impacts institutional design and are normally expected to result in different outcomes. Yet the findings show, despite minor differences, the outcome is centralized federalism and devolution. The primary explanation as elaborated well in chapter one emanates from the nature of state power in Africa. State power in Africa is not regulated and affects federalism and devolution in many respects. Whatever institutional designs are put in place, big men, hegemonic and dominant parties, army, business elite are the actual machines that operate the designs. The nature of power in Africa—an imperial center (regardless of whether the design in the constitution is presidential or parliamentary, integration or accommodation) and the patron-client relations between the center and sub units; stability imperative³³⁸—the claim by the federal government to contain centrifugal forces also explain the unitary features of African federal and devolved systems. Within this overall observation however we find some distinctive nuances. In the case of Nigeria, Kenya and South Africa, centralization is the result of both *design and practise*. One should note as well by design Kenya and South Africa the focus is more or less *local decentralization* than empowering sub unit based federalism. The provinces in Kenya have no constitutional mandate (only counties have) and the provinces in South Africa are sandwiched between powerful center and assertive local government as the ANC had little interest to empower the provinces. Yet in all three federations, federal government enjoys long list of exclusive powers, shares concurrent mandate with the states and is backed by the principle that in case of conflict between federal and state law, the former prevails.³³⁹ Federal government often tends to

³³⁸ Dickovick (n 61).

³³⁹ See for example Article 192(2) of the Kenyan Constitution.

exhaust the concurrent field leaving little room to the states. The respective constitutions also provide wide discretion for federal intervention in the affairs of states.

Besides, in the case of Kenya and Nigeria, small size and large number of states are no matches to the imperial center. In the case of Ethiopia, despite generous grant of powers to the states with a focus on self-government and secession, hegemonic and single national party, centralizing ideology, frequent use of emergencies, command posts and personal rule have made self-rule hollow. Within these broad observation however, political pluralism and the progress towards democratization in Kenya and Nigeria has opened an opportunity for sub state governors to assert and exercise some level of autonomy as opposition parties have been able to win seats in several states. While in South Africa and Ethiopia the hegemonic parties have command and control over sub units. Yet the ANC is losing dominance in the bigger cities and that has opened political space for opposition coalition to assume power. Ethiopia is an extreme case of central political control and complete disregard of the constitution with little or no progress towards democratization. This context explains the political explosion it continues to face. Donald Horowitz argues the opening up of local political space (as in the three countries) averts the likely hood of ethnic separatism: losers at federal level can still enjoy self-government at sub unit level. Politics is not any more zero-sum game and this reduces the high stakes of power at the center. Marginalization at federal level and denial of self-government at sub unit levels reinforces alienation and separation.³⁴⁰ This is what is happening in Ethiopia. It is zero-sum game and the stakes are high and risky at the center. Despite these important nuances, assessed from the ideals of federalism, self-rule in African federal and devolved systems remains a promise betrayed and cleavages continue to push for a political space at sub unit level and accommodation at federal level, albeit to varying degrees.

³⁴⁰ Horowitz (n 54): 221–223.



Devolution and Transition in Sudan

5.1 INTRODUCTION

Geographically one of the biggest in Africa, the Sudan according to latest estimation has a population of 48 million, constituting some sixty ethnic groups.¹ The groups that claim as descendants from Arab and that dominated the North (Sudan's post-colonial politics as well) represent thirty nine per cent of the total population. The Black Africans residing in several parts of the Sudan represent some fifty eight per cent (6% being the Beja in the East) of the total population. In terms of religion seventy per cent are Muslims, five per cent Christians and twenty five per cent profess various religions of African tradition. Although the division between the North and the South dominates the literature on the Sudan it appears that such a classification is an oversimplification of a rather complex problem. As will be indicated latter, each side to the conflict in Sudan is far from homogenous.²

¹ <https://www.cia.gov/the-world-factbook/countries/sudan/>, accessed August 14, 2023.

² Harvey Glickman, 'Islamism in Sudan's Civil War,' *Orbis: A Quarterly Journal of World Affairs* 44:2 (Spring 2000): 269; Douglas Johnson, *The Root Causes of Sudan's Civil Wars* (Oxford, James Currey, 2003).

The North is itself inhabited by different groups but is dominated like the rest of the country by political elites (riverine Arabs) that consider themselves descendants of Arabic tradition and followers of Islam.³ Islam and Arabization became the twin tools for assimilating the different ethnic groups and regions of Sudan. Certainly there are many ethnic groups in the North that profess Islam but they do not consider themselves as Arabs and have been marginalized like the other groups from the Southern, Western-Darfur and East- Beja region. Darfur, Nuba mountains and the Beja of the Red Sea are Muslim but they do not consider themselves as Arabs and have been as marginalized as the South and continue to challenge the center.⁴ The Southern region is inhabited by different groups professing different religions and speaking different dialects and within itself very diverse with little unifying factor except the painful history of the slave trade, discrimination, socio-economic under development and more importantly their sustained struggle against the central government that initially aimed at secession but later seemed to have been reshaped into a genuine federal solution and redefinition of the country's identity. With the failure of the Comprehensive Peace Agreement (CPA), secession of South Sudan became a reality in 2011. It should be noted that the struggle in South Sudan against the center was regional, not ethno national based as it hosted diverse communities together under the South Sudan People's Liberation Movement/Army (SPLM/A).

Sudan emerged as independent state on January 1956 and since then the country's political history has been marked by instability, faced Africa's longest civil war between the North and South only interrupted for eleven years as a result of the Addis Ababa Accord (1972–83). Sudan's instability has recently been aggravated by insurgents from the East—Beja group, the Darfur region, Nuba Mountains, the youth based peaceful protests that began in 2019⁵ and more importantly by the fight between Rapid

³ Majak D'Agoot, 'How the Rise of the Rapid Support Forces Sparked Sudan's Meteoric Descent,' *Middle East Policy* (2023) 11.

⁴ John Markakis, 'The Crisis of the State in the Horn of Africa' in John Markakis, Gunther Schlee and John Young eds., *The Nation State: A Wrong Model for the Horn of Africa* (Max Planck: 2021): 37.

⁵ Political and economic marginalization of the region by central government led to the emergence of two rebel forces: the Sudan Liberation Army and the Justice and Equality Movement in February 2003. Resource competition existed for long between those who claim Black African descent and those who claim Arab descent though both groups practice Islam. With the signing of the Comprehensive Peace Agreement (CPA) in 2005 to

Support Forces (RSF) led by Mohamed Hamdan Dagalo also known as Hemedti and the Sudan Armed Forces (SAF) that erupted in April 2023.

Sudan's governance system has been dominated by military regimes (three successful and thirteen failed coups) except a few interruptions by civilians.⁶ Chief among the military rulers include General Ibrahim Abboud (1958–1964) who was responsible for the introduction of Sudan's homogenization policy based on Arab and Islam, Colonel Ja'afar Nummeri (1969–1985), Abdel Rahman Swar al-Dahab (1985–1986), Brigadier Omar Hassan Ahmad al-Bashir (1989–2019) that continued the expansion of Arab/Islamic culture of dominance throughout the country and half-heartedly introduced a federal constitution in 1998.⁷ The military also called Sudan Armed Forces (SAF) controls not only the military but also remains to this date a key political actor.⁸ The army remained resilient for no less than five decades until it faced the 2019 protests and the subsequent fight with the RSF. The top echelons of the army leadership come from central Sudan's main ethnic groups: the Jaaliyin, Shagiya, and Danagla. This elite has concentrated power and resources of the country for decades, crafted centralized nation state based on Islamic religion and Arabic language and marginalized the rest of Sudan, triggering wars and conflicts.⁹ As will be shown later, the army's hegemonic role is certainly not favourable condition for devolution and democratization.

The Sudan has never been able to craft an inclusive political system that reflects its ethnic and regional dimensions. Relations between the center and periphery have been tense. Despite pushes for devolution and

their exclusion they attacked government forces and the latter in return started to arm Arab Militias- *Janjaweed* from the same region to check the insurgency and the crisis in Darfur took its present shape. See Scott Straus, 'Darfur and the Genocide Debate,' *Foreign Affairs*, 84:1 (January/February 2005).

⁶ D'Agoot (n 3): 6.

⁷ Omer Awadalla Ali Gasmelseid, *Federalism as Conflict Management Device for Multi-ethnic and Multicultural Societies: The case of Sudan* (Bale: Helbing & Lichtenhahn 2006): 28-33. The political instability is also visible if one looks at Sudan's many transitional constitutions, two permanent constitutions, countless decrees and series of Peace Agreements.

⁸ *Hemedti Challenges SAF's Control over Sudan*, (Sudan Rapid Response update 1, Rift Valley Institute, May 2023).

⁹ See for details John Young, *The Fate of Sudan: The Origins and Consequences of a Flawed Peace Process* (London: Zed Books, 2012).

inclusion from the periphery, the center continued to impose assimilationist centralized state based on twin foundations: Islamic religion and Arabic language. This chapter aims to address the root causes of Sudan's instability and suggests alternative ways to manage the relations between the center and the periphery. It shows that the main source of instability and conflict are related to concentration of power and resources by the old establishment based in the capital that also imposed narrow based nation building strategy based on Islam and Arabic Language. It demonstrates that devolution and political inclusion are ideal options both for the center and the periphery but all efforts to implement devolution and power sharing are defied by the old establishment's centralist mind set and its failure to honor series of agreements for power sharing and devolution. From the Addis Ababa agreement on Southern autonomy to the 1998 federal constitution, the CPA and subsequent peace deals for the East and Darfur to the post-2019 deals for power sharing and federalism, all have been violated by the center. The center lacks political will to be abided by the agreements. The dominant role of the army is also an obstacle to devolution, the development of institutions and the rule of law.

The study is based the analyses of the constitutional arrangement and the different peace agreements signed between the government and rebel forces based on the rich literature on federalism and devolution. Empirical data was collected from fifteen key Sudan's political actors both from the opposition and the ruling party between 2015 and 2018. Reports issued on Sudan by donors and relevant international organizations have also been used to reinforce the empirical data.

The chapter has five parts including the introduction presented above. Part two discusses key concepts used in analysing the Sudan's case. Part three presents the main sources of Sudan's instability that emerged in the different periods since independence. Part four explains the different peace agreements and power sharing arrangements that aimed to address the demands from the periphery. This part also explains the causes of the 2019 protests and the main actors. It analyses how the hegemonic role of the army challenges the different peace agreements and the effort to devolve power to sub units. The last part is the conclusion.

5.2 CONCEPTS AND FRAMEWORK

There is a lot of use and misuse of concepts related to federalism devolution and local government in the literature.¹⁰ Traditionally devolved systems within unitary states are compared with federations. In general devolution refers to the transfer of power from the center to sub units, the latter enjoying some level of political, fiscal and administrative autonomy.¹¹ However the transfer of power may or may not have constitutional backing. In devolved unitary systems, the transfer of power from the center to devolved units is not necessarily entrenched in a constitution. Sub units are often creations of the center by a statute and are thus subordinate to it.¹² The arrangement presupposes the existence of central authority, which may for one reason or another transfer a portion of its authority to sub units but such transfer is subject to *unilateral withdrawal, amendment or revocation* by the center. The center's decision to end the local unit's autonomy merely requires the passage of legislation. The number, boundary and power of the devolved units remain under the prerogative of the center. Besides, in devolved systems, the emphasis is on self-rule rather than on shared rule. A much diminished form of transfer of power to sub units (mere administrative power not accompanied by autonomy to make political decisions) could be deconcentrated system where the center retains political decision making to itself.¹³ As will be shown later, Sudan under al-Bashir remained deconcentrated system despite the constitution and other peace agreements stipulating for devolution or federalism at different times.

In a federation on the other hand, the division of power is constitutionally guaranteed and the states are not creations of the federal government. Both the federal government and the states derive their authority from the federal constitution and as a result neither level can change the terms of

¹⁰ For the different meanings on decentralization see Markus Bockenforde, *A Practical Guide to Constitution Building: Decentralized Forms of Governments*, (International Institute for Democracy and Electoral Assistance 2011): 4; compare with Ronald Watts, *Comparing Federal Systems* 3rd edn., (Montreal and Kingston: McGill Queen's University Press, 2008): 9.

¹¹ Jean-Paul, Faguet, 'Decentralization and Governance,' *World Development* 53:2 (2014): 2–12.

¹² Ronald Watts (n 10): 9.

¹³ Peter Wanyande, 'Decentralization and Local Governance: A Conceptual and Theoretical Discourse,' *Regional Development Dialogue* 25: 1 (2004): 5.

the compact as enshrined in the constitution.¹⁴ Furthermore, in a federation, the division of power is constitutionally guaranteed and the states are not creations of the federal government. Both the federal government and the states derive their authority from the federal constitution and as a result neither level can change the terms of the compact as enshrined in the constitution. There is thus an important difference between the two types of transfer of powers. Devolved unitary systems do not have the legal safe guards necessary to curb undue political interference on their autonomy from the center.¹⁵ When the transfer of power takes the form of a federation entrenched in a constitution, the federal government cannot interfere on the list of powers transferred to the states. Besides, there is often a legal guarantee in the constitution that protects the mandate of the states when encroachments materialize.¹⁶

Devolution assumes transfer of political, administrative and financial powers from the center to sub units. In a genuine devolution, the sub units enjoy some level of autonomy free from the interference of the center.¹⁷ Military rule follows top-down, command and control system and has no space for sub unit autonomy. There are already enough evidences indicating that devolution can survive and serve as a tool for conflict management only if supported by a genuine implementation of the promises made in the constitution, democratic political institutions, political will to implement the constitution and some form of checks and balances.¹⁸ Military rule is an obstacle to devolution. Surely some of the institutions that are established at national or local level are expected to be run by elected representatives and that can only be so if there is a democratic process in place. The lack of such a democratic atmosphere and institutions indeed is one of the challenges for the success of any federal or devolved arrangements in Africa. As will be demonstrated below, the Sudan claims to be a devolved system or at other times a federation on

¹⁴ Daniel Elazar, *Exploring Federalism* (Tuscaloosa: University of Alabama Press, 1987): 35.

¹⁵ Bockenforde (n 10): 7.

¹⁶ Watts (n 10) Yet devolution in South Africa and Kenya are entrenched in the constitution and resemble more a federation than devolution in the way defined here.

¹⁷ Ibid.: 6.

¹⁸ Ibid.: 14; John McGarry, Brendan O'Leary, 'Must Pluri-national Federations Fail?', *Ethnopolitics* 8:1 (2009): 11.

paper but the facts on the ground show, it is a weak form of deconcentration as the army at the center not only appoints and dismisses sub unit heads but has also defied all promises for devolution and inclusion maintaining firm control over power and the country's resources.

The case study of Sudan and analysis of the cause of its instability seems to present a text book case for conflict study. Federalism and devolution provide solution to the root causes of identity and regional based conflicts. Political and economic injustice caused by the state remains at the heart of identity or regional based mobilization (relative deprivation theory: systematic and identity based deprivation of groups from power and resources/economy)¹⁹ but the search for dignity, demand for recognition, collective security and self-esteem are the core factors that flames and gives it the emotive force. While the relative deprivation theory focuses on the power and resource element, the human needs theory²⁰ goes much further than that to include the need for collective security, right to exist as a group, prevention from threats of genocide and ethnic cleansing- the passions and emotions beyond the material interests of ethno national minorities.²¹ The gist as argued by Connor goes 'Better a government run like hell by Filipinos than one run like heaven by Americans.'²² Federalism and devolution provide an inclusive political system at the center and autonomy at sub unit level. Recognition and accommodation are pillars of federalism and devolution and this combination goes long way in responding to identity and regional based conflicts. As a result, ensuring peace within states, ending war and conflict through federalism and devolution became preoccupation of local, regional and international actors since the end of the Cold War with the rise of intra state conflicts. Devolution and federalism with their promises of promoting unity and ensuring self-government at constituent

¹⁹ Ted Robert Gurr, *Minorities at Risk: A Global View of Ethnopolitical Conflict* (Washington: United States Institute of Peace Press, 1993): 18–20; see also Sujit Choudhry and Nathan Hume, 'Federalism, Devolution and Secession: From Classical to Post-Conflict Federalism,' in Tom Ginsburg and Rosalind Dixon eds., *Comparative Constitutional Law* (Cheltenham: Edward Elgar, 2011): 364.

²⁰ See for details John Burton, *Violence Explained* (Manchester: Manchester University Press, 1997): 32–37.

²¹ Dawn Walsh, *Territorial Self Government as Conflict Management Tool* (Chan: Palgrave Macmillan, 2018): 4–5.

²² Walker, Connor, 'Nation Building or Nation Destroying?,' *World Politics* 24:3 (1972): 343.

unit level are hoped to be an ideal solution and magic compromise accommodating the two rival interests.²³ In the case of Sudan, insecurity and fear of extinction, imposing racial and Arabic identity on non-Arab Muslims and people of the South, ethnic cleansing- major concern of many ethnic groups and regions as well as the Genocide in Darfur (human needs theory) explain the non-material aspects and causes of mobilization that combine with the political and economic marginalization setting perfect condition for a political storm. The war with South Sudan and the subsequent regional conflicts that engulfed Sudan demonstrate this reality. Devolution and political inclusion at national level respond to the demand for self-government, recognition and some level of accommodation from the periphery. Yet, the ruling elite's hegemonic role in politics and economy as well as its insistence on Arab identity made instability and conflict in Sudan's inevitable.

5.3 SUDAN'S INSTABILITY

The cause of the civil war in the South, the resistance against what the latter considered as unjust political and economic situation actually precedes Sudan's independence. As early as 1947, the Juba Conference that constituted representatives both from the north and south indicated that the Southern region demand for federal accommodation will be given 'full consideration',²⁴ yet was soon abandoned at independence. This broken promise was further aggravated by series of events that were pursued by the regime. It started with the marginalization of the South from the civil service, neglect of their concerns including the federal option and more importantly political domination of the North and the imposition of its racial, cultural, linguistic and religious identity on the whole country that the South resented and rejected.²⁵ Nation building

²³ Donald Horowitz, *Ethnic Groups in Conflict*, (University of California Press, Berkeley, 1985); Foulie Psalidas-Perlmutter, 'The Interplay of Myths and Realities,' *Orbis: A Quarterly Journal of World Affairs* 44:2 (Spring 2000): 237-244; William Zartman, 'Mediating Conflicts of Need, Greed and Creed,' *Orbis: A Quarterly Journal of World Affairs* 44:2 (Spring 2000): 255-266.

²⁴ Ahmed T. el-Gaili, 'Federalism and the Tyranny of Majorities: Challenges to Islamic Federalism in Sudan,' 45 *Harvard International Law Journal* 45:2 (2004): 504.

²⁵ Francis Deng, *Southern Sudan and the Cultural Change of Governance, Conference on the Current Peace and security Challenges in the Horn of Africa*, (Addis Ababa: Inter Africa group, 2007): 92.

in Sudan was designed by the homogenization policy based on Arab and Islamic culture that was officially introduced during Aboud's military regime (1958–64) that among others changed weekly holidays from Sunday to Friday, introduced Arabic as mandatory language in schools and even changed Christian names. This is a process that more or less seemed an attempt to reverse the colonial 'Southern policy.'²⁶ Thus from the out set there was a failure to establish an inclusive state that gives space to pluralism as it resorted to centralized nation building as envisaged by the ruling elite. Not surprisingly the civil war erupted in 1962 with the establishment of a Guerrilla movement the Anya Nya –an Equatoria dominated rebel movement led by Joseph Lagu who called for South Sudan independence, later replaced by the South Sudan Liberation Movement following the failure of the Addis Ababa agreement in the early 1970s.²⁷

That the conflict between the North and South should not be viewed merely as a struggle between the Arabs espousing Islam on one hand and Christian/Animists Africans on the other can easily be demonstrated by the crisis in West Darfur region and other parts of the country. Darfur is a region inhabited by African and Arabic tribes and the close link of this region to the Arabic and Islamic culture of the North did not prevent the Fur from marginalization and abuse by the central government and Arab pastoralists in 2003 resulting in indictment of al-Bashir by the International Criminal Court for war crimes, crimes against humanity and genocide following the Darfur crisis.²⁸ The political and economic marginalization of the region, resource conflict among the ethnic groups in the region and the wide spread allegation that the central government was supporting the Arab tribes/militia (*Janjaweed*) in the region fueled the crisis in the region in 2003.²⁹ RSF's leader Mohammed Hamden

²⁶ The Southern policy was introduced by the British (1917–1945) that created a buffer zone between the North and the south with a view to merging the south possibly with Kenya and/or Uganda. The policy among other things prohibited Islam and Arabic language in the South. It was abolished in the 1947 Juba Conference in which representatives from the North and South agreed to end it and promised federalism to the South at Independence. See Awadalla Ali (n 7): 22–23.

²⁷ This movement forced the government to negotiate and sign the Addis Ababa Agreement and when the agreement was abolished in 1983 the Sudan People Liberation Army/Movement (SPLA/M) emerged.

²⁸ D'Agoo (n 3): 5.

²⁹ It is already reported that some 300,000 people have lost their lives since the conflict erupted in 2003 but such figures are often disputed by the GoS. See Darfur Deaths

Dagalo's (also called Hemdeti) emergence to the political scene in Sudan and its link with the regime in power indeed goes to the Darfur crisis. The regime in Khartoum backed the Arab militia in Darfur to crush the local rebellion letting the Arab militia loot, pillage and rape. In the process Hemedti emerged as the most capable of the *Janjaweed's* junior commander with his ties to al-Bashir.³⁰ Bashir put together all the various paramilitary forces under Hemedti in 2013 and branded them as RSF and used them as regime's protectors from army take over. The relationships between the al-Bashir and Hemedti were not always smooth but despite opposition from the army head, al-Bashir brought the paramilitary force led by Hemedti to the national scene giving its leader the rank of general. At the height of the protests against regime in December 2018, the RSF was summoned to save the regime but later switched allegiance and played key role in removing regime head. Both RSF and SAF removed al-Bashir in 2019 and toppled civilian government in October 2021 in breach of the power sharing agreement and the transitional constitutional document. Rivalry for power between the heads of RSF and SAF led to the eruption of war in April 2023.³¹

Although RSF's leader claims descent from the Mahariya Arab clan in Darfur, his social base and the lower ranks of the RSF represent the most neglected region of Darfur and the elite in Khartoum view's him as uneducated stranger from the periphery and threat to the center's hegemonic political and economic interests in Sudan. The RSF was engaged in the fight in Yemen in 2016 against the Houthis on the side of the Arab alliance (United Arab Emirates and Saudi Arabia) and in Libya that enhanced its regional role. RSF runs gold mining and trading companies.³² As such it is a government within a government representing the periphery now officially engaged in the fight against the SAF.

Coming back to Sudan's instability in different parts of the country, before the secession of South Sudan, the Sudan had at least six cultural regions, two in the South (the Nilotic and Equatoria), the Fur, Nuba,

Could be 300,000, <http://news.bbc.co.uk/2/hi/africa/7361979.htm>, accessed on April 24, 2008.

³⁰ Alex de Waal, 'The Revolution No One Wanted,' *London Review of Books* 45:10 (18 May, 2023).

³¹ Comfort Ero and Richard Atwood, Sudan and the New Age of Conflict: How Regional Power Politics are Fuelling Deadly Wars, *Foreign Affairs* (May 2023).

³² De Waal (n 30).

Maban and the Beja that challenged the Government of Sudan (GoS). All seem to share the same complaint: political and economic marginalization by the Arabic group and the imposition of its racial, cultural, linguistic and religious identity on the whole country and thus urged for a federal solution that ensures some form of autonomy and political representation at the center. As far as the Southern region is concerned however, as evidenced in the Comprehensive Peace Agreement (CPA, 2005–2011), political separation from the North was not ruled out.

5.4 THE ADDIS ABABA AGREEMENT

Only colonel Ja'afar Nummeri attempted to provide a political solution to the crisis in the South via the Addis Ababa agreement.³³ This agreement which was later incorporated into Southern provinces Regional self Government Act of 1972 and the Constitution of 1973 granted, some form of self-rule to the Southern region coupled with power sharing mechanisms at central level but rejected secession as proposed by the Anyanya rebels.³⁴ The Agreement ensured autonomy to the south legislative body elected by the voter directly and executive council. English was introduced as a regional language in addition to Arabic which was a national language and as a result the scheme provided a relief to the conflict in Sudan for at least 11 years (1972–1983). Dinka dominance in public institutions and subsequent complaints by non-Dinka ethnic groups triggered Nummeri to meddle over the Southern autonomy. With the unilateral decision³⁵ by Nummeri himself in June 1983 to divide the South into three regions (Bahr El Gazal, Equatoria and Upper Nile) and subsequent appointment of three governors, the agreement was violated. The urge by non Dinka groups for division of South Sudan is infamously called as *Kokora* a Bari language which imply that Dinka will be limited

³³ To be sure there were intense debates and negotiations between delegates of the North and the South during independence and even after. Typical of which is the 1965 Round Table conference that never materialized owing to the military Coup in 1969. See Steve Odero Ouma, *Federalism as Peace Making Device in Sudan's Interim National Constitution*, (LLM Thesis 2005 unpublished): 32–33.

³⁴ John Young, 'South Sudan: a Fractured State,' in John Markakis, Gunther Schlee and John Young eds., *The Nation State: A Wrong Model for the Horn of Africa* (Max Planck: 2021): 147.

³⁵ The agreement provided that whatever adjustments to the accord would need approval from the South via a referendum.

to 'their home place only' that angered the Dinka elite. Fracture within the Southern elite goes all the way to this period (Equatoria vs. Dinka) and was further antagonized with the 1991 split in the SPLM between the Dinka dominated SPLA and Nuer dominated South Sudan Defence Force (SSDF) on whether South Sudan should remain within Sudan or secede. The elite fracture continued after independence and took its ugly form in 2013 making governance in the new state very challenging.³⁶

With the introduction of *Sharia* as a source of legal system by the Nummeri regime, interpreted by the South as a continuation of northern dominance and politics of divide and rule, the agreement was breached and the civil war erupted again in 1983 this time led by Sudan Peoples' Liberation Movement/Army (SPLM/A) led by Dr. John Garang.

It must be noted that the unilateral abrogation of the Addis Ababa agreement by the center contradicts with the federal principle and the agreement itself. A genuine federal arrangement ensures political and territorial autonomy to the regions/units and any adjustments to the federal pact that may arise because of changing political and economic circumstances require the participation of both levels of governments. Federalism is a covenant between partners and any unilateral breach violates the federal partnership.³⁷ The political will to make it work is critical and in most parts of Africa, the center often unilaterally abrogates the pact triggering a new wave of conflict. A careful observation of the agreement also hints that it was designed more as a political expediency than as a result of the federal principle. After the agreement, two governments existed for the 11 years: the Government of the North and that of the South. A genuinely negotiated federal solution established between two parties normally would result in three governments: the two parties that will continue to constitute the regions, cantons, provinces, states depending on how one prefers to call them and the federal government. Yet this was never realized in the agreement and ironically the same institutional ambiguity seems to be repeating itself once again in the CPA signed in 2005. Two lessons, therefore, emerge from the failure of the Addis Ababa agreement: a federal arrangement can succeed only if there is a commitment by the actors to the federal principle to work according to

³⁶ Young (n 34, 2021): 148 argued that while the South Sudanese elite remained united in the struggle against the North, fracture within SPLM has triggered several internal wars within the SPLM itself, the two most brutal ones being in 1991 and 2013.

³⁷ See Elazar (n 14): 2–7.

the agreed principles and must be supported by appropriate institutions. Surely these important principles, remain, even today core preconditions for any federal success in the Horn.

5.5 OTHER PEACE DEALS

The search for a comprehensive and all inclusive constitutional/political formula acceptable to the various contending political forces in the Sudan has been a challenge since independence. The approach in Sudan appears to be the insistence *on piece meal solution* to the different challenges arising in several parts of Sudan. Apart from the failed Addis Ababa accord, Sudan introduced a federal constitution in 1998 with 26 states. Apparently, like any other federal system, the constitution lists down powers of the federal government, the states and what can be exercised jointly. But in reality, the center's preeminence both politically and financially is clearly visible and whatever regions/states existed they had no effective role in the central decision making process. Only the CPA provided for a federal Council of State consisting of two representatives from each state. Nor do the states have any role in the constitutional amendment process. As we noted already, if federalism is endorsed as a partnership between the two levels of governments then any adjustment requires the participation of the states.

The nature and diversity of Sudan and the level of political mobilization for inclusion by the periphery makes a federal option imperative yet even after the adoption of the 1998 constitution conflicts continued in several parts of the country. This is partly so because the constitution was not implemented. Thus the problem of integrating Sudan's different ethnic and regional groups remained politically and constitutionally unresolved. The Government of Sudan (GoS) was forced to enter into separate peace agreements with the different rebel forces which as we will see later have brought its own complications.

5.5.1 *The Comprehensive Peace Agreement (CPA), Interim Constitution and the Other Agreements*

With an effort to bring the civil war in Sudan, Emperor Haile Selassie of Ethiopia facilitated a peace talks between the GoS and the SPLM resulting in the *Koka* Dam declaration in 1986. The declaration aimed at ending the application of Sharia in the South, declared a cease fire

and opened possibility of reintroducing autonomy in the South. It was aborted by a military coup led by Islamist leader Hassan al-Turabi- head of National Islamic Front (NIF) and general Omar al-Bahir removing an elected government led by Sadig al-Mahdi in 1989 and imposed Sharia on the South aggravating the conflict further.³⁸ The NIF provided the ideological framework for the new regime until relations between Turabi and al-Bashir soured following the attempted assassination of the Egyptian President Mubarak in Addis Ababa in 1995. Turabi also hosted Osama bin Laden in Sudan and with the bombing of US Embassy in Kenya in 1998, USA–Sudan relations came to a halt and al-Bashir began to disassociate himself from Turabi, opening the possibility for a negotiated peace in South Sudan.³⁹

The signing of the CPA in January 2005 and its incorporation into the Interim Constitution was an attempt to bring to an end to Sudan's longest civil war between the GoS and the SPLM/A. The 2005 Constitution of Sudan that followed the signing of the CPA declares under Article 1 'The Republic of the Sudan is an independent, sovereign State. It is a democratic, *decentralized*, multi-cultural, multi-racial, multi-ethnic, multi-religious, and multilingual country where such diversities co-exist.' Thus, the constitution makes it clear that Sudan is not federal but decentralized unitary state. But as indicated below, the CPA grants an asymmetric autonomy to the South that allows it to enjoy more autonomy than other parts of the Sudan. Article 24 of the same constitution mentions the different levels of governments: national, state and local. The decentralized system in Sudan is thus multilevel. Schedule A and C of the constitution list down the respective powers of the national and state governments. Schedule D provides the concurrent list and the constitution regulates conflict of laws in Schedule F. Article 25 lists down key principles that guide the decentralization: respect for autonomy of the different levels of governments, unity in diversity, participation of the people in the different levels of government and good governance. Consistent with the federal principle, Article 85 established the Council of States (second chamber) composed of two representatives from each state and elected by the state legislative bodies. As a result, two separate

³⁸ Markais (n 4): 40.

³⁹ Khalid Mustafa Medani, 'Strife and Secession in Sudan,' *Journal of Democracy* 22:3 (2011).

legal regimes remained in force. Asymmetric autonomy for South Sudan based on CPA and decentralized system for the rest of Sudan based on the 1998 constitution.

The CPA and subsequent documents, among other things, entitled the people of Southern Sudan right for a referendum to determine their future, that is, to confirm the unity of Sudan by voting to adopt the system of government established under the peace agreement or vote for secession during a transition process that lasts six years; to control and govern their own affairs and to participate in the national government. Other subsequent negotiations within the framework of the CPA as well provided for general principles for sharing revenue, natural resources and to establish more inclusive civil service and cabinet posts. The CPA required both the GoS and SPLM/A to make 'unity' attractive. The then leader of the SPLM/A John Garang mindful of the potential opposition to secession for South Sudan following the end of the Cold War by the international community as well committed to his vision of New Sudan that is federal, democratic and secular and thus secession was not ruled out but inserted only as last resort. The vision of 'new Sudan' was a cause of rift within the SPLM/A in 1991 in which Riek Machar led opposition from within defected leading to a tragic war and Garang's successor Salva Kiir abandoned it following the death of Garang in a tragic helicopter crash in Uganda in July 2005.⁴⁰

In the section on structure of government subsequently negotiated, it is stipulated that legislation that applies to states other than Southern Sudan shall have *Sharia* as a source while for the latter its source was popular consensus, the values, traditions and customs of the people of the South.⁴¹ In terms of power sharing scheme, the agreement stipulates that the ruling National Congress Party (NCP) will be represented by 52%, the SPLM 28%, other northern political parties 14% and other Southern political parties 6%. The power sharing agreement as well provides that the government shall consist of the President and two vice presidents. The then incumbent President will be the President and commander in chief of Sudan armed forces and the SPLM chairman or his successor will be first vice President and will at the same time hold post of President of the government of Southern Sudan and commander in chief of the

⁴⁰ Young (n 9).

⁴¹ See Article 5 of the Interim Constitution.

SPLA.⁴² The CPA granted asymmetric autonomy to ten states in South Sudan.

Subsequent agreement between the GoS and SPLM provided a formula for resource sharing that allocated 50:50 share of oil revenue from the oil that is generated from South Sudan after 2% is deducted for the state where the oil comes from. Another separate agreement regulated Abeyi, an oil rich contested area where colonial era treaties made it part of the North, the Addis Ababa agreement promised right to self-determination but was aborted alongside the agreement and the SPLM had control over it in the 1980s bringing it under its sphere of influence. The CPA as well dealt with South Kordofan and the Blue Nile, the former geographically in the north but has been under the control of the SPLM. The special protocol regulating both areas provided for consultations to be made with the people of both regions before a final resolution is made. As noted already the fact that the CPA was signed while the 1998 constitution is in place indicates that the latter falls short of satisfying the existing challenges and raises questions on its relevance.

A lot of important remarks could be made on the CPA and the Interim Constitution when envisaged from the federal principle. Firstly, while the CPA attempted to resolve the fight between the GoS and SPLM/A- two of the major protagonists, and in this regard is an important step forward, it should have been envisaged from the out set that the rigidity of the power sharing arrangement⁴³ might be a stumbling block in the search for comprehensive peace in Sudan.⁴⁴ Certainly the agreement left the two signatories with 80% of share in power and with only 20% for the rest (the East, Darfur etc.). Thus although the CPA and subsequent negotiations between the two major actors seem to be limited

⁴² Alex De Waal, 'When Kleptocracy becomes Insolvent: Brute Cause of the Civil War in South Sudan,' *African Affairs* 113: 452 (2014): 347–369.

⁴³ Let alone from the perspective of rebel forces that did not participate in the CPA, seen from the opposition parties operating in the North some complain that the process was exclusive and not comprehensive as is implied in the name. See for example Abdelwahab El-Affendi, *The View from the North: The CPA's Hopes and Multiple Disappointments, Conference on the Current Peace and security Challenges in the Horn of Africa*, (Addis Ababa: InterAfrica Group (2007): 82–89.

⁴⁴ John Young even warns that the CPA lays the basis for future conflict because it is exclusive, top bottom and externally induced. See John Young, *Sudan's Peace Process: Laying the Basis for Future Conflict, Conference on the Current Peace and security Challenges in the Horn of Africa*, (Addis Ababa: InterAfrica Group, 2007): 108–126.

in scope between the GoS and SPLM/A, it has a wide ranging implications for the other parts of the country.⁴⁵ The privileged position of the GoS and the SPLA over the CPA and the failure to include other groups certainly had its own effects and predictably, those forces that were 'left out in the cold' ignited awful conflicts in several parts of the country and called for active engagement in the process. This in turn led to the contested Darfur Peace Agreement (DPA)⁴⁶ of May 2006 and Eastern Sudan- the Beja that started their resistance as early as 1960s (the Beja Congress) but entered into armed confrontation with the GoS since 1994 claiming self-rule, power and resource sharing. This led to the Peace Agreement of Eastern Sudan (ESPA) of October 2006. Both agreements were very much guided by the CPA and granted the two regions significant autonomy and share of national power and wealth but certainly were constrained by the CPA. Besides the DPA and ESPA do not grant self determination to the two regions concerned and hence falls short of what is stipulated for South Sudan in the CPA. John Yong argues that the fact that the CPA focused on the SPLM/A as the only actor has erred big by leaving out another actor, the South Sudan Defence Force (SSDF), a Nuer dominated opposition army that challenges the Dinka dominated SPLM/A.⁴⁷ This became visible after South Sudan's independence in which rivalry for power between elites of the two groups made governance impossible in South Sudan.

Secondly, a comparison of the CPA, DPA, ESPA and the 1998 Constitution clearly indicates that Southern Sudan is accorded a special status. In the federal jargon this is called asymmetric federal system that grants a relatively higher status to Southern Sudan and accordingly reduces the role of the federal/national government. Other regions however do not enjoy the same status and may be subject to greater control and intervention by the center. This raises the question whether the other regions will in the end accept such a lower status and more importantly the Interim constitution and the CPA may, by granting a special status to the Southern

⁴⁵ One classic challenge relates to the fact that the CPA provided that *Sharia* will serve as a source of law in all parts of Sudan except the Southern region and certainly there are many regions and groups in the North, West and East that resist such clause.

⁴⁶ Contested because not all the rebel forces seem to be part of the DPA and the situation in Darfur has not shown significant improvement.

⁴⁷ Young (n 9): 152.

region facilitating its partition.⁴⁸ Indeed that is what followed after the referendum held in 2011. Yet even if the tension is ended by the secession of the South, there are still great differences among the Southern components which can destabilize both the new southern state and the North as well. The antagonisms among the Southern components are manifested, according to some reports by the main stream SPLA dominated by Dinka and various factions of the SPLA with Nuer/Equatoria background. Many argue that the only unifying factor for the Southerners seems to be based on the common repression by and resistance to the GoS. Once the new state is born, the minor ethnic groups are subject to the same domination and same normative questions of how to share power and resources and how to integrate the different groups will emerge. Absent amicable solution, it might lead to another civil war and further fragmentation. The rounds of civil wars and crisis in South Sudan after independence indeed demonstrated this reality.

Thirdly, as a result of the various complicated Peace Agreements, we have complex set of constitutional and political documents: the 1998 constitution, the CPA, DPA and ESPA. Admittedly, every federal system has its own *peculiarities* but what makes the Sudan's case interesting is that it is based on a series of treaties that look more like the several treaties that created the European Union than a federal system proper. Once again a federal system requires a single federal constitution that serves as source of legitimacy and hence supreme and that binds both levels of governments. In the case of Sudan this is not the case. Further anomaly resulting from all these Peace Agreements is that it was not clear whether the GoS is going to play dual role: Government of North and federal government/ National Unity Government or another entity is yet to be created. As we mentioned already, when a federal system is established from two or more actors, it results in a newly born federal government. This was not the case in the Addis Ababa accord, in the CPA and the other agreements. This gave the chance for the GoS to dominate the process as it would allow it to play dual roles: government of the north and federal government that will certainly affect the hard won Peace Agreements. This is crucial because of the fact that on issues of religion the National Unity

⁴⁸ For the dilemmas involved with the use of asymmetric arrangement as solution to conflicts see Will Kymlicka, 'Federalism, Nationalism, and Multiculturalism,' in Dimitrios Karmis and Wayne Norman eds., *Theories of federalism* (Macmillan: Palgrave, 2005): 277–282.

Government was expected to be neutral but when it acts as government of the North, it may impose *Sharia*. This is further complicated by the fact that, the capital city is found in the North that according to the CPA is governed by *Sharia* law and consisted of no less than three million non-Northerners.

Way before the above complex issues were sorted out, time was running out for conducting a referendum in South Sudan. Although the CPA required both the GoS and SPLM/A to make unity attractive, there was little effort to make that a reality and secession seemed a default option. In 2011, the South Sudanese voted in an overwhelming majority (98%) in favour of secession. Following this development, the regime in the north was engaged in taking measures that counter devolution. The President issued decrees that mandate him to appoint and dismiss state governors, legislative bodies and centralized resources in 2015. A narrative emerged within the political elite in the north that focused as if South Sudan seceded because of federalism/devolution and the measures taken by the President were justified as necessary to ensure unity of Sudan.⁴⁹ While the constitution as indicated above recognized Sudan's diversity, the regime relapsed in its promises and emphasized Sudan as homogenous and part of the Arab world neglecting as before the periphery. While a national dialogue was promoted to address the crisis in the different parts of Sudan (2015–2017), major political actors from the periphery were left out and thus the dialogue failed in its objective.⁵⁰

5.6 POST SECESSION SUDAN: THE PROTESTS, TRANSITION AND THE WAR

Sudan's economy began to decline as it lost most of the oil revenue (75%) that used to come from South Sudan. Following South Sudan's secession the regime in Khartoum made significant retreat from the promises for federalism and devolution to people in the periphery. In 2015, the 2005 constitution was amended that allowed al-Bashir to appoint and

⁴⁹ This was the dominant narrative by the ruling party and main stream Sudan's elite in the capital in 2015. Interview with main stream political party members of the ruling party and the opposition, 15 November 2015.

⁵⁰ The Max Planck Foundation on Peace and Rule of Law from Germany organized and facilitated many of such dialogues but the conflict in the periphery remained active. Most key leaders from Darfur and the East were missing from such events.

remove state governors, dissolve state legislative bodies and centralise the fiscal regime turning Sudan's federalism to a de-concentrated unit. The regime turned sub units to be agents of national government aborting the devolution promised in the constitution and the periphery continued to challenge the center. Despite regime sponsored series of dialogues to address Sudan's identity (is Sudan homogenous Arab affiliated state or diverse) and the concerns of the people in the periphery, the center remained adamant to any serious political reforms. It continued to ignore the major political actors particularly those in the periphery. Civil war was raging in Darfur, the Blue Nile, Abeyi, South Kordofan and Nuba mountains that forced the regime to swell its security apparatus further draining the country's budget.⁵¹

The decline in the economy forced the regime to introduce fuel rationing when inflation was on the rise and price of consumption goods such as bread escalating. In between the regime began implementing austerity measures that resulted in increase in the price of oil, removal of fuel subsidy triggering youth based movements and protests throughout the country but mainly in its capital Khartoum. The economic crisis and the mass based protests intensified split within the ruling National Congress Party (NCP), the army and the security sector. Observing these developments President Omar al-Bashir began to introduce security reforms side lining some of his close allies such as the then head of the National Intelligence Security Services (NISS) Salah Gosh who had strong contacts with international and regional actors such as Saudi Arabia, Egypt and United Arab Emirates. As the Sudan's constitution provided term limit on the power of the president and internal NCP party rule provided the same, Gosh apparently after consulting the President declared in February 2019 stating that the President will step down because of term limits implying the constitution will not be amended to allow him to run for the 2020 election. Quite to the contrary, the President declared his plan to run for the planned election, issued a one year emergency rule dissolving national and state governments replacing them with army generals close to the President and forming a new government. Salah in coordination with army, national and regional actors have already decided that al-Bashir is a threat to the regime and has to be removed

⁵¹ Young (n 9): 340.

resulting in the detention of the President on 11 April 2019 and subsequent establishment of Transitional Military Council (TMC) led by Lt. General Ahmed Awad Ibn Auf. The cabinet, national and state legislatures were subsequently dissolved; the 2005 constitution was suspended giving the TMC a free hand over the political destiny of Sudan.⁵²

The amorphous youth based protest movement began to take shape as it attracted many actors yearning for political and economic reform in Sudan. Many seem to agree not only on the popularity of the protests but also on the fact that it was all inclusive, grass root based and well organized by a network of different professions that cut across ethnic, gender and regional divides.⁵³ Its class and regional element predominated the ethnic factor and aimed to end military rule, transfer power to civilians and address the civil wars.

The sit-in brought together all Sudanese: youth, civil society groups, women, street children found refuge there, families came to stroll at the end of the day, and the 'periphery' groups from Darfur, the Blue Nile, and the Nuba Mountains or the East came to expose.⁵⁴

A group of Sudanese professional associations (SPA) that constituted a union and network of different professions emerged from within the protests and brought together opposition political parties and some armed groups to establish the Forces for Freedom and Change (FFC). The FFC articulated its goal that included ending al-Bashir's rule, establishing a *civilian* transitional government led by qualified professionals, end the conflict in different regions and addressing the root causes of the political and economic crisis in the country.⁵⁵ In between, after detaining its leader, the army also began to show its own political ambition and to rule on its own and thus led to the emergence of competition for power between the FFC and the army. The army took a series of repressive

⁵² W. J. Berridge, 'Briefing: The Uprising in Sudan,' *African Affairs* 119: 1 (2019): 164–176.

⁵³ Kevin Anderson, 'Sudan's Revolution of 2019: At the Crossroads of Africa and the Arab World,' *New Politics* 17:4 (2020).

⁵⁴ Jean-Nicolas Bach, 'Sudan: The December 2018 Revolution and its aftermath,' in Jean-Nicolas Bach with Jon Abbink, Stéphane Ancel, Azza Ahmed Abdel Aziz, Emanuele Fantini, Patrick Ferras, Hassan Mwakimako, Clélie Nallet, Aleksi Ylönen, and Jan Záhorký eds., *Routledge Handbook of the Horn of Africa* (London: Routledge, 2022): 383.

⁵⁵ *Ibid.*: 380.

measures against the protesters including killing and detention, making it unpopular and pressures from the FFC resulted in the resignation of both Salah Gosh and Ibn Auf and the replacement of the latter by Lt. General Abdel-Fatah al-Burhan considered more acceptable by protesters. Al-Burhan announced that the TMC will lead the country for two years of transition and will then hand over power to an elected government. The FFC opposed the TMC's plan and intensified its protests. The tension between the TMC and FCC with the mediation of regional and international actors resulted in elite compromise on July 2019. A power sharing arrangement between the civilian wing and the army was signed that established an eleven person Sovereign Council (SC)—Sudan's highest authority that would govern for thirty nine months after which elections will be held. In between, the SC will be led by a general for twenty one months and then followed by a civilian for the rest of the eighteen months period of transition.⁵⁶

The members of the SC included five military personnel chosen by the TMC, five civilians selected by the FFC and an eleventh member selected by consensus. A transitional government was established on 21 August 2019 when the head of the TMC Lt. General Abdel-Fatah al-Burhan was sworn in as head of the SC. Council of Minsters was established in which the FFC appointed Abdullah Hamdok, technocrat economics expert, as Prime Minister and he in turn appointed ministers with the exception of minsters of defence and interior- two critical minsters reserved for the TMC. An interim Constitutional Charter was signed and a 300 member legislative council composed of two-third from FFC members and one-third from other sections of society that have supported the regime change was also established concluding more or less the show of force between the TMC and the FFC.⁵⁷ Yet this was only for a short period. As indicated later, after dislodging the civilian wing from the transition process, power struggle between the RSF and SAF has erupted in April

⁵⁶ For details see John Young, *Sudan's Uprising: Popular Struggles, Elite Compromises and Revolution Betrayed*, (Geneva: Small Arms Survey, 2020). Report from Small Arms Survey's Human Security Baseline Assessment June 2020 <https://www.smallarmssurvey.org/resource/sudan-uprising-popular-struggles-elite-compromises-and-revolution-betrayed>, accessed August 15, 2023.

⁵⁷ Young (n 9).

2023 that challenges not only the process of transition but also Sudan's overall political stability and possibly beyond.⁵⁸

Observers think that the power sharing scheme between the civilian wing and the army including the SC has resulted in the dominance of the army and diminished the role of the FFC and the youth protesters who have sacrificed a lot to bring to an end decades of military rule in the Sudan. The FFC was effective in removing al-Bashir but has failed to meet two of its core goals: establishing a civilian government and addressing the root causes of the civil war in several parts of Sudan (Darfur, Blue Nile, the East and Nuba Mountains).⁵⁹

The power sharing arrangement between the civilians and army abandoned the issue of marginalized groups and regions in the periphery way before it was further subverted by the October 2021 military coup. The new ruling coalition was largely a reflection of Sudan's old establishment in new form reinforcing the Arab Supremacy in the Sudan. Young wrote:

The agreements between the FFC and TMC make no provision for federalism or regional representation in the Sovereign Council, Council of Ministers, or Legislative Council...the generals will not readily accept the transformation of the *ethnocratic* state of which they have been major beneficiaries, and neither will the traditional political parties. Many who participated in and supported the 2018–19 uprising wanted a secular regime to be established, but this is determinedly opposed by the generals, sectarian parties whose legitimacy is based on Islam, traditionally minded Sudanese, and the Gulf backers of the generals, and these same Gulf countries are financially underwriting the transitional government. Security forces are closely tied to Egypt, Saudi Arabia, and the UAE, together with Sudan's dependence on financing from the Gulf states.⁶⁰

Despite the fragmentation of the NCP, SAF as dominant military and political elite continued to control Sudan's power, resources as well as the army and security. Real power including foreign affairs (despite the mandate assigned to the Prime Minister to appoint foreign Minister) remains with the army and head of the SC- al-Burhan continues to play key role in the region. The youth have lost control over the process of

⁵⁸ Ero and Atwood (n 31).

⁵⁹ Young (n 56): 56.

⁶⁰ Ibid.

transition and thus some argue, the cause of the protests is aborted as the primary causes of the revolution have not been resolved leaving open the possibility for the continued instability in the country. As in most parts of Africa, successive regimes in Sudan have failed to politically integrate the periphery. Yet South Sudan's secession leaves the option open to marginalized groups throughout the country: for the elite in power it is a trauma that they do not want to repeat while for the marginalized ethnic groups and regions, it is a relevant experience close to home which they aspire to achieve.

The Transition has continued to bring three new major developments however. The Juba Agreement for Peace in Sudan (3 October 2020) signed between the Transitional Government of Sudan and several rebel forces (that were not included in the negotiations between the army and the civilian wing in August 2019)⁶¹ has introduced amendments to the Transitional Charter signed in 2019. A peace agreement signed between the Transitional Government and various rebels promised the separation of state and religion and envisaged Sudan as multi-ethnic, multi religious and multicultural state. It also promised fair representation of the rebel forces in the national transitional government.⁶² This is critical because the Sudan's 2005 constitution that had some elements of devolution is repealed by the Transitional Charter of 2019. A new constitution is yet to be adopted during the transition period. Significant in this regard was the replacement of governors of the 18 provinces by the Transitional government replacing Al-Bashir's military appointment before his removal.

The Juba Agreement among others provides that the Sudan will be a federation: Darfur, the Eastern region and Kordofan will enjoy substantial political autonomy and representation in the transitional national

⁶¹ For the different Armed groups and their factions operating in Darfur, Kordofan, and Blue Nile see Jean-Nicolas Bach, (n 54): 384.

⁶² See Benjamin Takpiny, *Sudan Government, Rebel groups sign Peace Deal* available at <https://www.aa.com.tr/en/africa/sudan-government-rebel-groups-sign-peace-deal/1994730>, accessed August 15, 2023.

institutions.⁶³ The Agreement even goes to list down exclusive provincial, exclusive central and shared powers in the Kordofan and the Blue Nile Agreements. Rebel groups that have signed the Agreement are also ensured to have three representatives in the SC, five representatives to the Council of Ministers and 25% of the seats in the transitional legislature. The Juba Agreement thus resolves some of the ambiguities within the Transitional Charter of 2019. Yet the Agreement does not provide details with respect to the rest of Sudan. The new leadership seems to move towards federation based on the historic nine regions that became twenty five in 2005, ten of which became part of South Sudan, leaving the Sudan with fifteen regions. Fractures in Darfur and Kordofan have created three new states increasing the number of regions to eighteen. Yet as indicated above, outside of Darfur, the Blue Nile and Kordofan, it is not clear if Sudan will make the regions full-fledged sub units in the planned federation. Certainly these arrangements remain mere promises, yet the October 2020 framework is used by Hemedti to weaken and split the Center. Besides, some major parties such as the Sudanese Communist Party (SCP) and the Umma National Party (UNP), two of the major parties that established the FFC, have some reservations on the Juba Agreement and the promise on federalism. As in the CPA, the different peace agreements signed with different rebel forces in Juba aim to bring power and resource sharing between the Transitional Government and the major rebel forces and thus remained elitist lacking popular and civilian participation. Thus Babiker and Battahani rightly conclude, the Sudan is engaged in series of constitution *writing*, not in constitution *making*.⁶⁴ If one adds the post CPA peace deals with rebel forces to the Juba agreements (six), there are

⁶³ See Article 4(2) of the Agreement signed on 2 November 2020 that amends the Transitional Charter. For detail comments on the Juba Agreement see Zaid Al-Ali, *The Juba Agreement for Peace in Sudan* (International Institute for Democracy and Electoral Assistance, 2021).

⁶⁴ Anwar Elhaj, *The System of Governance Reform in Sudan: Challenges and Opportunities* available at <https://constitutionnet.org/news/system-governance-reform-sudan-challenges-and-opportunities>, accessed August 15, 2023; see also Mohammed Abdelsalam Babiker and Atta H. el-Battahani, *Reflections on Sudan's Constitutional Trajectory, 1953-2023* (International IDEA, 2023): 22 where both authors argue the Juba Agreement violates the Transitional Constitution. Constitution making as normative concept is an inclusive process where society shapes its own political destiny by establishing public institutions with some power, separation of powers and bill of rights.

no less than ten such peace agreements and all were betrayed. As shown below, the agreements did not as well ensure peace.

Second major development in October 2021 however overshadows the above development. The military wing led by General Abdul Fattah al-Burhan has conducted a coup, detained the civilian wing and declared emergency dissolving the SC and the cabinet. It seems that Sudan is replicating the practise in Egypt by aborting the popular revolution and returning to full-fledged military rule. The same old establishment from the military is determined to maintain the centralized rule aborting the demand for transition and inclusion of the periphery. As it did with the post CPA peace deals, the regime betrayed the Juba agreements. The Sudan has thus too many peace deals for elite power and resource sharing accompanied by too many betrayals. Following this development, anti-military protests were active in Sudan but it is hardly possible to predict whether they will be able to put enough pressure to bring back the civilian rule. Jerome Tubiana wrote ‘Sudan needs a dual transition: not only from a military regime to a civilian government, but also from a centralized state towards a government and armed forces that properly represent all its national components.’⁶⁵ Tubiana further argues that the center—periphery contentions in Sudan have not been addressed despite the popular nature of the 2019 Revolution. The old establishment also called ‘riverine elite’ that rules at center is determined to maintain the centralized spirit despite wide support for the revolution from Darfur, Nuba Mountains and the Blue Nile. The revolution has thus failed to dislodge the ruling elite that has little interest to address the demands from the periphery and grass root pushes for civilian rule. There is also fracture within the elite both of the center and the periphery that complicated the transition. Within the old establishment from the center, there is fracture between the civilian and the army. Within the periphery, there is tension between the RSF (with its initial base in Darfur and supported by the Arabs implicated in many of the crimes committed in Darfur but has later included militias from other parts of Sudan during the protests and subsequently) led by Hemedti, a key player and vice president of the TMC and non-Arab rebels from Darfur. In any case it is clear that

⁶⁵ Jerome Tubiana, ‘The Sudanese Transition seen from its Peripheries (2018–2021),’ in Jean-Nicolas Bach with Jon Abbink, Stéphane Ancel, Azza Ahmed Abdel Aziz, Emanuele Fantini, Patrick Ferras, Hassan Mwakimako, Clélie Nallet, Aleksy Ylönen, and Jan Záhořík eds., *Routledge Handbook of the Horn of Africa* (London: Routledge, 2022): 404.

the coup has brought to an end the much needed transition to civilian rule and the issue of self-government from the periphery that could have ensured peace to the Sudan.

The third major development is the war between the RSF and SAF that started in the capital but soon expanded to other places in the country. As the process of transition faced challenges from the army, regional and international actors were pushing to save the transition. In December 2022 a frame work agreement was signed to end the military rule and to bring back civilian wing to power. In the process the issue of integrating the RSF emerged that led to misunderstanding between al-Burhan and his deputy (Hemedti) leading to war between the two army generals that erupted in April 2023. The immediate causes of the war between RSF and SAF are far from clear but seem to relate to the December 2022 frame-work agreement that aimed to address the integration of the RSF to SAF. The RSF leader thinks that military reforms have to be held within SAF before integration or else prefers to keep the RSF as its guarantor. The SAF leaders on the other hand think that integrating the RSF to SAF could weaken the army and put it under RSF's influence. Increased RSF influence would mean the end of the old establishment's (SAF's political and military elite) hegemonic political and economic role in Sudan. The process of integration also brings issue of leadership. Who leads the would be integrated army: the head of SAF or RSF? Hemedti's ambition is to become an equal with SAF leader while SAF's leader wants to keep Hemedti as deputy. In short, it is power struggle between two army generals and as is the case in most conflicts in Africa, it is a struggle for control of power and Sudan's resources.⁶⁶ It is a familiar story except that this time around it started in the capital: the relatively peaceful and home to all Sudanese and displaced people from other countries such as Ethiopia and Eritrea. Previous wars and conflicts have been in the periphery. Yet this war is also distinct because the RSF is slowly trying to present itself as voice for the periphery and his fight is against the old establishment.⁶⁷ The RSF in addition to its engagement in Yemen and Libya is involved with Russia's Wagner Group. The power struggle between the SAF and RSF is in a way result of the informalization of the army and security undertaken by Bashir. Bashir used the informal militia groups to crush

⁶⁶ Sudan: Civil War Looms, *African Research Bulletin* 60:4 (2023).

⁶⁷ D'Agoot (n 3): 11.

rebels in the periphery and as a guarantor against military coup and by doing so privatized the state and its security.⁶⁸

Regional and international actors taking sides with either RSF or SAF further complicate the crisis in Sudan. South Sudan is trying to balance its interest particularly the flow of its oil pipe lines in Sudan that constitutes 90% of its budget by keeping distance from SAF and RSF.⁶⁹ Egypt thinks that civilian led transition in Sudan could bring back the Arab Spring and thus backs the SAF. Egypt as well hosts hundreds of thousands of refugees from Sudan and considers SAF as an institution that ensures its interests.⁷⁰ Egypt and Sudan are beneficiaries of the Nile water that mainly comes from Ethiopia. The Nile remains the main source of Egypt's water and objected construction of dam in Ethiopia. Sudan initially backed the Grand Ethiopian Renaissance Dam but with the regime change in Ethiopia in 2018, it shifted its support to Egypt. The west has not given up on the agenda of return to civilian rule and possible transition to democratization although as the crisis deepens, it seems in disarray. The west is also preoccupied with the crisis in Ukraine and the Middles East. Some countries such as Russia and United Arab Emirates seem to be backing Hemedti. Hemedti was supported by Libya's General Haftar and has close links with Muslim Arabs in Chad that border Darfur. Eritrea is slowly trying to emerge as regional player and pretending to mediate between the two army generals although it backed RSF during the start of the war. Ethiopia too is no stranger to the scene. Despite efforts to show impartial mediation to the crisis in Sudan and its own internal political turmoil, Ethiopian government wants to prolong the crisis in Sudan so as to regain its territory in the west (al-Fashaga) currently occupied by Sudan. Along with the United Arab Emirates, it is now backing RSF. Sudan occupied this territory following the eruption of the war in Tigray in November 2020 allegedly with the blessing of the regime in Addis in exchange for Sudan blocking the Tigrayan forces access to the Sudan. The Sudan's crisis has therefore regional implications.

⁶⁸ Joshua Craze, *Gunshots in Khartoum*, New Left Review available at <https://newleftreview.org/sidecar/posts/gunshots-in-khartoum>, accessed April 17, 2023.

⁶⁹ *Sudan Conflict: Assessing the Risks of Regionalization*, (Sudan Rapid Response Briefing 2, Rift Valley Institute, June 2023).

⁷⁰ Ero and Atwood (n 31).

5.7 CONCLUSION

Sudan's state crafting process as envisaged by the center, marginalized the periphery and the latter continued to push for inclusion and autonomy. The center's failure to respond to demands and implement the series of agreements resulted in tension and conflict between the center the periphery. While the 2019 popular protests created a golden opportunity for the implementation of devolution and possible transition to democracy, the latest developments show that the transition is aborted. Sudan's old establishment: the army and the political elite in the capital is slowly taking charge of the process. Yet the war that broke out in April 2023 between SAF and RSF although it seems a fracture within the army is partly result of informalization of the army and security sector that started by the old establishment now taking a new shape. RSF is trying to present itself as a voice for the periphery and this is reinforced by center's narrative of presenting Hemedti as rude and stranger not able to lead Sudan. The SAF presents itself as the old establishment with only minor changes: removal of al-Bashor and his top cronies. While the outcome of the fight between SAF and RSF far from settled and unpredictable, the periphery's demand for devolution, political inclusion, self-government and democratization remains unresolved. The several peace agreements including the latest Juba efforts that aimed to address the periphery have been discarded. Indeed the current stalemate and the fight between SAF and RSF has brought the Center- periphery conflict to the capital- Khar-toum. It is time that Sudan's periphery be given a voice in the capital through inclusive political process that also includes other actors: the very forces that brought al-Bashir's era to end in 2019 (civilians and civil society groups) and SAF itself. This should be complemented by a political and constitutional reform that ensures transfer of power, resources and administration to regions.

Yet, success for devolution depends on whether the polity is building inclusive political institutions and accommodative nation building strategy. The Sudan has gone through tormenting political instability resulting in countless transitions and constitutions and coups. The military and the old establishment remain key political actors in the Sudan and despite popular and civilian backed protests, the hopes for devolution and democratization, the army has aborted the very causes of the protests. The old establishment continues to promote narrow based ideology of nation building based on Islam and Arabic identity. Entrenched power

and interest is thus a major challenge to devolution. Elites and political parties that prefer centralized model of governance use different techniques to obstruct well designed decentralization projects. The demands from the periphery for self-government are thus far from addressed and it is likely that conflicts will continue to challenge the Sudan affecting its stability. We noted already the several efforts made to address Sudan's age old source of conflict and war: regime's centralization of power, resources and imposition of Islam and Arab identity on the periphery. The 1998 constitution, the CPA, several peace agreements for the East and Darfur, power sharing arrangement that followed the protests and the Juba Agreements were meant to address the demands from the periphery. Yet, they were all violated. This shows that there is no political will from actors particularly those in power and the lack of the rule of law. Devolution and federalism are rule based. They allocate competencies between the center and sub units and whoever violates the pact faces consequences. An independent body is mandated to address the violation and nullify it and ensure constitutionalism. No such arrangement exists in the Sudan and thus the political system has no guarantee for the genuine implementation of devolution. It is essential that the all-inclusive political transition provides an autonomous institutional safeguard in the form of constitutional court that enforces the political deals. As it stands, the Sudan is a classic example of series of constitutions without constitutionalism.

Two further remarks: the central governments of the countries of the Horn seem to worry about the ugly and unhappy results of secession and are opposed to it while those who claim to have been marginalized from the political process insist on its exercise with the hope of new life in the new state. Never the less both forces need to realize that their worries and interests can safely be addressed if genuine federal system is put in place without necessarily insisting on either a centralized unitary state or secession. Those who aspire for secession also need to realize that the new state that they aspire might not necessarily address all their worries. The same old issues that triggered their secession might repeat themselves in the new state. The reality in South Sudan after 2011 shows this hard reality. Finally, whatever positive roles devolution and democracy may have in ameliorating conflicts in the Horn, the mounting evidences of interference and proxy wars among the countries of the Horn, regional actors and world powers hint that stability is not necessarily dependent on internal political dynamics. Regional and international actors play a significant role and this is visible in the Horn.



Constitutional Adjudication and Constitutional Governance

6.1 INTRODUCTION

6.1.1 *Constitutional and Political Context*

As outlined in the previous chapters, Ethiopia existed as a sovereign and independent state since the Axumite Kingdom.¹ The Emperor, often called, King of Kings, represented the center while several provincial kingdoms exercised some element of autonomy. The centralized modern state that abolished such decentralized system, however emerged towards the last quarter of the nineteenth century. The modern state was a typical ‘nation state’ that attempted to assimilate its diverse communities under the imported European nation state with the slogan ‘one language and one religion.’² Provincial and later ethno nationalist forces resisted the homogenizing and centralized state and finally brought its end in 1991 after years of civil war. The ‘nationality question,’ that is, the right to self-government and fair representation in central government institutions was main driver of the civil war and with the end of the war, the 1995

¹ Legends take it even to an earlier period but archaeological discoveries and recorded history indicate Ethiopia’s state since the first century A.D. See Bahru Zewde, *A History of Modern Ethiopia 1855–1974* (Athens, OH: Ohio University Press, 2001).

² See the 1955 Revised Constitution that declared Ethiopian as an Orthodox Christian State and Amharic as the only National language of the country.

constitution aimed to address this age old question. Since then ethno nationalist forces emerged as key players in the country's political system. Some 27 political actors, the dominant being the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF)³ established a transitional government (1991–1994) of Ethiopia (TGE) and introduced a federal constitution that established nine regional states and two autonomous cities. Four new states have been established following the fragmentation of the South since the new government assumed power in 2018.

Not surprisingly the process of restructuring the centrist state both during the transition and subsequently in to a federation was very much dominated by the 'National Liberation Movements' that removed the military junta and its political project of integrating the country in 1991.⁴ These forces remained dominant until the ruling party went into internal crisis as a result of the protests that began in Oromia in 2015, expanded to other places and resulted in a new leadership that partly changed the course of Ethiopian politics since 2018.

The above scenario of an ethno national based dominant party is not without implications on institutional design. In constitutional design, the process is certainly as important as the final product. It needs to be inclusive and open to representatives of various views. The constitution is supposed to reflect the compromises made by key political actors and the people. The strong attachment expected to exist between 'we the nations, nationalities and peoples of Ethiopia' as authors of the constitution can only be true if there is a more inclusive and deliberative constitution making process. The openness of the process has impact on the legitimacy of the product, the constitution and the institutions created. In this respect, the promising beginning during the formation of the TGE by establishing a more inclusive government did not end as intended. Disagreements over the process of transition, the overall political direction and democratization led to a subsequent withdrawal of some opposition

³ EPRDF is a coalition of four parties namely the Tigray Peoples Liberation Front, the Amhara National Democratic Movement, the Oromo Peoples Democratic Organization and the Southern Peoples Democratic Movement. It was the dominant force during the transition and remains to be the ruling party even today.

⁴ Christopher Clapham, 'Ethnicity and the National Question in Ethiopia,' in Peter Woodward and Murray Forsyth eds., *Conflict and Peace in the Horn of Africa: Federalism and its Alternatives* (Aldershot: Dartmouth 1994): 27–40.

parties such as the Oromo Liberation Front (OLF)⁵ and centrist elite from the TGE thus resulting in a TGE largely dominated by the EPRDF. A conference that began with more inclusive political actors and TGE became less inclusive towards the end of its term.⁶

It is vital to look at the effect of one party dominant system to the overall political system in general and to constitutional interpretation in particular. With the exception of the early period of the transition (1991–1994) and the 2005–2010 period where the various opposition groups shared parliamentary seats, political institutions both at federal and state level are since 1991 dominated by the same ruling party. As the cases discussed in later sections demonstrate, it is hardly possible to think of serious checks and balances among the institutions in this context. A majoritarian political organ such as the House of Federation (HoF), controlled by key political figures of the same party is supposed to play as a counter majoritarian role in the enforcement of human rights, set limits on power and impartially adjudicate disputes between levels and branches of governments. This rather conflicting role of the HoF is partly the result of the same party controlling the political institutions including the HoF since its establishment in 1995 and partly the product of a one party dominated constitution making process hardly conceivable in a more inclusive constitution making process where competing forces exist with a comparable political weight. In this regard Tom Ginsburg's observation drawn from East Asian experience that for long went through dominant party systems is revealing:

Where a single party dominates the process, it has *little incentive* to set up a neutral arbiter to resolve disputes about the constitutional meanings. ... Explicit constitutional power of and access to judicial review will be greater where political forces are diffused than where a single dominant party exists at the time of constitutional design.... Where political forces

⁵ The OLF was one of the major partners during the TGE.

⁶ Marina Ottaway, 'The Ethiopian Transition: Democratization or New Authoritarianism?' *Northeast African Studies* 2:3 (2005): 73; see also John Young (1998) who argued '[c]onstitution-making under the EPRDF has little in common with the bargaining, trade-offs, and compromises that usually typify such processes; rather it reflects the weakness of the country's democratic institutions, the political objectives of the governing party, and its position of dominance within a state where serious opposition had been crushed or marginalized,' 191, 195. John Young, 'Regionalism and Democracy in Ethiopia,' *Third World Quarterly* 19:2 (1998): 191, 195.

are ... scattered, no party can confidently predict that it will be able to win post constitutional elections. Because of such uncertainty to win, all parties will prefer to limit the majority and institutionalize judicial review. The structure of the party system and configuration of political forces remain key factors.⁷

Ginsburg explains why South Korea adopted judicial review compared to Taiwan and other dominant party regimes that have not adopted such institution and thus argues that when political pluralism is the norm and when various parties alternate in power through democratic election, parties would prefer to install 'insurance model of judicial review' realized through a Supreme Court or constitutional court.⁸ Knowing that the party will lose dominance in political institutions through free and fair election, it would seek an impartial and autonomous court to ensure its rights as a political minority until such time that it comes back as a political majority through free and fair election.⁹ The new political minority will seek the same institutional guarantee. The institution serves as insurance during democratic political loss, the same way insurance policy serves in time of risk.

A more coherent argument explaining the entrenchment of human rights and their subsequent enforcement through judicial review has been proposed by Hirschl under the 'strategic approach and hegemonic preservation thesis.' The thesis goes *beyond electoral uncertainty* and

⁷ Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003): 24–25.

⁸ In addition to the insurance model, there are other justifications for judicial review such as constitutionalism and the nature and special competence of the judiciary. It has often been argued since the famous case of *Marbury v. Madison* (1803) that judicial review is the ordinary function of the courts. In this famous case U.S. Supreme Court Justice John Marshal argued (1) that the constitution is law; (2) it is emphatically the province and duty of the judicial department to say what the law is; and thus, the argument goes, (3) judicial review of legislation must be an integral part of the political system. Alexander Hamilton on the *Federalist Papers No 78* elaborated, judicial review of legislation for its compatibility with a higher law is inherent in the nature of judicial power. Walter Murphy, James Fleming, and Sotirios Barber, *American Constitutional Interpretation*, 2nd edn (Westbury, NY: Foundation Press, 1995): 52.

⁹ See also Mark Tushnet, *Comparative Constitutional Law* (Cheltenham: Edward Elgar, 2014): 41, 44.

insurance argument developed by Ginsburg. It is driven by strategic political, economic and legal considerations of the main political actors at the time of constitutional design. Hirschl wrote:

Judicial power clearly does not fall from the sky. It is politically constructed. The constitutionalization of rights and the fortification of judicial review result from a strategic pact led by hegemonic yet increasingly *threatened political elites* seeking to *insulate their policy preferences* against the changing fortunes of democratic politics, in association with economic and judicial elites who have compatible interests. The changes that emerge reflect a combination of the policy preferences and professional interests of these groups. Judicial empowerment through constitutionalization is best understood as the byproduct of a strategic interplay between three key groups: threatened *political elites* who seek to preserve or enhance their political hegemony by insulating policy-making processes from the vicissitudes of democratic politics; *economic elites* who may view the constitutionalization of certain economic liberties as a means of promoting a neoliberal agenda of open markets, economic deregulation, anti-statism, and anti-collectivism; and *judicial elites* and national high courts that seek to enhance their political influence and international reputation. In other words, strategic legal innovators-political elites in association with economic and judicial elites who have compatible interests determine the timing, extent, and nature of constitutional reforms.¹⁰

Judicial review is thus a means to protect political and economic interests of key political actors who think the political process may shift with the political wind and thus put their interests at stake. To avoid that risk, they entrench their interests by way of list of rights in the constitution and assign the judiciary to safeguard those interests by insulating such interests from the political process. The 1996 South African constitution along with the bill of rights and constitutional court demonstrates the deal between the African National Congress (ANC) and white minority. Although the ANC wanted a more radical social reengineering to address age old socio-economic inequality, this ambition was tempered by the bill of rights and the constitutional court established to protect the right of property holders. In a way this has prolonged the pain within the black majority's aspiration for socio-economic justice. It also explains

¹⁰ Ran Hirschl, 'The Political Origins of the New Constitutionalism,' *Indiana Global Journal of Legal Studies* 11:1 (2004): 98.

the USA constitutional system and its highest court. The insurance model and hegemonic preservation thesis focus on the strategic calculation of political actors during the constitutional design process. Both arguments remain very important institutional safeguard for a constitution that adopted multiparty democracy and that aims to promote political pluralism. As will be illustrated later in specific cases indeed this explains very well the HoF's reluctance to mediate constitutional disputes impartially.

The insurance model, the strategic approach and hegemonic preservation thesis, although the most advanced theories on judicial review are not, however, the only reasons why polities in general and federal systems in particular opt for impartial and autonomous body to umpire disputes between levels and branches of governments. Federalism and the need for an umpire that enforces the division of powers as guaranteed in the supreme constitution and the need to ensure that the pact is not violated unilaterally either by the federal government or states, the right to be *heard* and the need to enforce the regime of human rights (individual or minority: the human rights consciousness and revolution since 1960s¹¹), technical competence of the interpreter as well as shaping the political process and ensuring the rule of law are major reasons for setting up the institution of judicial review. Indeed many argue that no single theory alone justifies judicial review. Comparative study provides a rich and relevant lesson that can help address one of Ethiopia's age old and major issue: can the political system in general and the federation in particular be shaped and regulated by a political body such as HoF? If not what options are available? But, first a brief account of a much broader issue of who should do such a major task and why is in order.

6.2 WHO SHOULD INTERPRET THE CONSTITUTION AND WHY?

Who should interpret the constitution and decide the constitutionality of laws, executive decisions and umpire disputes among public institutions? Should it be the people themselves, the political institutions or the courts, remained central issue in political and constitutional discourse. If

¹¹ Charles Epp, *The Rights Revolution* (Chicago: The University of Chicago Press, 1998).

this mandate is left to courts, should this power be granted to the regular courts or a special constitutional courts? Also controversial is whether courts should remain the sole institutions for interpreting and enforcing human rights. Whether the judiciary should retain the *final* word with respect to interpreting the constitution, declaring a law unconstitutional and on the meaning and scope of rights is even more controversial one.¹²

The court's power to review government action, law or executive compatibility with the constitution and declare as unconstitutional when found inconsistent has been source of debate. We are familiar with the counter majoritarian dilemma coined by Alexander Bickel.¹³ That is the tension

¹² In some countries such as the United States, the Supreme Court practice strong judicial review and its decision of unconstitutionality is final unless the constitution is amended or the court overrules it. In other countries such as Canada (weak form of judicial review), the Court's decision can be overruled by the legislature. See Nicolas Aroney and John Kincaid, 'Introduction: Courts in Federal Countries,' in Nicolas Aroney and John Kincaid eds., *Courts in Federal Countries: Federalists or Unitarists?* (Toronto: University of Toronto Press, 2017): 9.

¹³ For details on the counter majoritarian dilemma see Alexander Bickel, *The Least Dangerous Branch* (Bobbs-Merrill, 1962); Jeremy Waldron, 'The Core of the Case Against Judicial Review,' *The Yale Law Journal* 115:6 (2006); Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999); Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2004); Kenneth Ward and Cecilia Castillo eds., *The Judiciary and American Democracy: Alexander Bickel, The Counter Majoritarian Difficulty* (Albany: State University of New York, 2005); D. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996); Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd edn (New Haven: Yale University Press, 1986); Christophe Wolfe, *Judicial Activism: Bulwark of Freedom or Precarious Security?* (Rowman and Littlefield Publishers, 1997): 30. It is truism however that American courts make law. See Kenneth Ward and Cecilia Castillo eds., *The Judiciary and American Democracy: Alexander Bickel, The Counter Majoritarian Difficulty* (Albany: State University of New York, 2005): 14–15. In Addition to the above cases in *Brown v. Board of Education* 347, US 483 (1954) and since then in a number of cases decided during the Warren Court (*Miranda v. Arizona*, 384 US 436 [1966], *Mapp v. Ohio* 367 US 643 [1961]) the Supreme Court played and continues to play a significant role in the resolution of constitutional disputes. What is contested is its role in policy making and the degree to which it should be tolerated and its problems with separation of powers. Does the Supreme Court have such authority especially in light of the fact that the constitution for at least the first century was generally understood to give no one branch with final authority? See Christopher Wolfe ed., *That Eminent Tribunal: Judicial Supremacy and the Constitution* (Princeton: Princeton University Press, 2004), Dworkin (n 13): 42 explains why courts become key to enforcement of rights based on the idea of constitutionalism. Democratic theory at its face value might imply that it is fairer to allow a majority to decide any issue than a minority. But that ignores the fact

between democracy and constitutionalism: an elected body of judges tells the political institutions (assumed to be elected ones) that their law or decisions are incompatible with the constitution and have to be nullified. In particular the issue of leaving out the last word to judges associated with the US Supreme Court claim for judicial supremacy¹⁴ is a contested one. Chief justice Charles Hughes chief justice from 1930–1941 is quoted to have said ‘we live under the constitution but the constitution is what the judges say it is.’¹⁵ Court’s expansion of its mandate at the expense of the political institutions led to the accusation of *juristocracy* (rule by judges, not rule by people) putting democracy at risk.

Those who argue that the constitution should be interpreted by the people themselves state that the constitution rests on consent: the consent of the governed—social contract between the people and their rulers whereby the people conferred certain powers, reserved certain privileges and generally laid out the terms on which they agreed to be governed. While some like Kramer insist, the people themselves can alone declare its true meaning, it is far from clear how the people exercise this power.¹⁶ What does the people as a whole mean? Is it opinion poll, the legislature, referendum? This perspective generally contends that there is no reason to assume that rights are better protected through the institution of judicial review than they would be by democratic institutions. Often labeled as ‘political safeguards’ model, the system trusts on the give and take system embedded in the political process including the bicameral legislature and the complicated law making process. Thus solutions to contentious issues such as abortion or electoral redrawing or flag burning should be sought

that decisions about rights against the majority are not issues that in fairness ought to be left to the majority against whom they are supposed to protect the individual. Constitutionalism demands that the majority must be restrained to protect individual rights. Court is another point of access for citizens. Cases related to reapportionment opened channels of political debate extending voting rights in the face of unwilling majority, the court in effect expanding democracy. Kenneth Ward and Cecilia Castillo, *supra* (2005): 54–57. To make the majority judge in its own case seems inconsistent and unjust.

¹⁴ Quoted in Christophe Wolfe, *Judicial Activism: Bulwark of Freedom or Precarious Security?* (Rowman and Littlefield Publishers, 1997): 30; implying that court settles important constitutional issues for the whole political system and the decisions of the court are binding on all branches. Waldron (n 13): 1354.

¹⁵ Quoted in Christophe Wolfe, *Judicial Activism: Bulwark of Freedom or Precarious Security?* (Rowman and Littlefield Publishers, 1997): 30.

¹⁶ Kramer (n 13): 10, 48.

through the political process, not through judicial review. Some mention the parliamentary systems such as the UK as functioning political systems without strong form of judicial review, though since 1998 courts assert mandate to review an act of parliament's compliance with the European Convention on human rights. Others mention the Nordic countries (small and homogenous countries found at the top of most indicators of good governance based on Freedom House ranking: human rights, rule of law, equality, welfare, peace, democracy) that either have no judicial review or have rarely used it despite its inclusion in the constitution as evidence to counter the US model of judicial review.¹⁷ Judicial review is considered as illegitimate, is counter-majoritarian and deviant, as it is decided by judges who are neither elected nor accountable, it is *counter* to democracy.

Very much related to the above is political constitutionalism,¹⁸ a theory that aims to reconcile parliamentary supremacy with constitutional supremacy. While not well articulated the claim goes the political institutions have political corrective mechanisms and deliberative processes that ensure the constitution is not violated. Discussions on draft law, expert opinion during hearing and consultation, factions within the ruling party or control system that may exist within the party, checks and balances within the two chamber legislature may serve as a means to check whether the constitution is respected in the process. Yet this does not address well what Tushnet calls 'putting the fox to guard the chicken-coop.'¹⁹ Current majority often has its own preoccupation very much motivated by self-interest or constituency driven demands that it is possible to be trapped in conflict of interest disregarding the constitution—fox cannot guard the chicken. Besides populism has brought new challenges. Majority that has come through an election controls all branches and does away with all autonomous institutions that serve as check and balance as they portray such institutions obstacles to their new brand nationalist democracy.

Judicial review is blamed as a disguise for judges to put their own ideology in the name of interpretation and thus turn themselves legislators contradicting with the policy making mandate of political institutions. In

¹⁷ Jeff King and R. Bellamy eds., *The Cambridge Handbook of Constitutional Theory* (Cambridge: Cambridge University Press, 2021).

¹⁸ Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law*, 2nd edn (Cheltenham: Edward Elgar, 2018): 54–57.

¹⁹ Tushnet (n 18): 54.

a number of cases such as *Roe v. Wade*, 410 US 113 (1973), *Baker v. Carr*, 369 US 186 (1962); *Bush v. Gore*, 531 US 98 (2000) and recently, *Dobbs v. Jackson Women's Health Organization*²⁰ that overturned *Roe v. Wade* (1973) stating there is no constitutional right to abortion while the constitution remained silent and such controversial policy issues should have been left to be decided by the political institutions, the Supreme Court under the pretext of interpreting the constitution issued policies that provoked unprecedented reaction from the political institution, and the Court was accused of turning itself into *super legislator*. This was pursued aggressively during the Warren Court (1953–1969) in which the Court expanded the scope of rights (activism). Congress at times reacted by trying to reverse decision of the Court for example in *Texas v. Johnson*, 491 US 397 (1989) by enacting Flag Protection Act in 1989, yet the Court did not hesitate to reverse such law in *United States v. Eichmann*, 496 US 310 (1990). The counter majoritarian argument thus goes, it is undemocratic for appointed judges to have the last word about what the law is. Policy making is the domain of political institutions, un elected judges should not substitute the political institutions and engage in policy making nullifying laws enacted by elected legislator. The judges should interpret, not make law, 'no legislation from the bench.' There is accusation of judicial imperialism that is the power of the court to overturn/strike down laws on the basis of something other than the constitution framed as judicial activism, that is the transformation of judicial review from an interpretation of the constitution to legislative power/policy making, the latter being the mandate of the political institutions.

6.2.1 Constitutionalism

It is not the place to engage into details on the concept of constitutionalism. Arguably, it is one of the contested concepts: narrow vs. broader, new vs. old, negative vs. positive constitutionalism, ideological or merely procedural constitutionalism. For example, Loughlin locates the origin of constitutionalism particularly to the US constitution (1787) and the adoption of a *liberal* written constitution and the central role played by the judiciary in enforcing it. With its focus on civil and political freedoms

²⁰ *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. ____ (2022).

and the notion of limited government, this approach shows it has *ideological* overtones.²¹ Others like Frankenberg argue about a more flexible conception of constitutionalism not rooted in a particular ideology but implying as a set of constitutional ideas about the exercise and limits of power suggesting that there are *varieties* of constitutionalism.²²

Suffice to mention here that lawyers tend to focus on the idea of the *enforcement* of constitutional limits on power often described as negative (old or narrow) constitutionalism, the focus of which is on limiting state power.²³ At a minimum, constitutionalism refers to the enforcement of the constitution and this can be understood to combine two precepts. The respect by political institutions to the norms of the constitution as grand norm that binds both the rulers and ruled, that is, the behavior of key political actors to act based on the constitution respecting the limits as outlined in the constitution. Secondly, constitutionalism refers to judicial enforcement of the constitution against those that violate it. This conception of constitutionalism has however been subject to criticism because it assumes negative role of the state (an impoverished (neo) liberal account of the state) and is associated with a minimal role of the state perhaps limited to ensuring law and order.²⁴ This conception of constitutionalism does not address growing concerns related to inequality.²⁵ Thus the state in many cases has broader mandate that aims to ensure the welfare of its citizens and in many developing countries may engage in massive infrastructure development such as roads, health facilities, air ports, schools and addressing poverty through pro-poor policies. In other words, it aims to *transform* society and hence some refer as ‘transformative constitutionalism.’²⁶ This role would normally require a state that is capable of

²¹ Martin Loughlin, *Against Constitutionalism* (Harvard University Press, 2022).

²² Gunter Frankenberg, *Comparative Constitutional Studies: Between Magic and Deceit* (Edward Elgar, 2018).

²³ C.H. McIlwain, *Constitutionalism: Ancient and Modern* (New York University Press, 1947): 21.

²⁴ See for example J. Waldron, ‘Constitutionalism—A Skeptical View,’ in T. Christiano and J. Christman eds., *Contemporary Debates in Political Philosophy* (Wiley-Blackwell, 2009).

²⁵ See for example Samuel Moyn, *Not Enough: Human Rights in Unequal World* (Cambridge, MA: Harvard University Press, 2018).

²⁶ Pius Langa, ‘Transformative Constitutionalism,’ *Stellenbosch Law Review* 17:3 (2006). Transformative constitutionalism within the South African and Indian constitutional

delivering such crucial services: an effective state capable of *acting*- that Barber calls 'positive constitutionalism.'²⁷ Yet, even this broader conception of constitutionalism requires the state to remain *accountable* both through the democratic process and the notions of separation of powers, the rule of law and respect for human rights.²⁸

The arguments against judicial review discussed in the previous section are not without limitations. Constitutionalism whether defined in the negative or positive sense requires the judiciary to play its role. Courts are duty bound to give detail reasons in their judgment and have self-correcting system by way of appeals unlike the political institutions. Courts also remain accountable to legislative bodies in many countries. In theory as well as in practice there is no pure democracy but constitutional democracy where the constitution enjoys supremacy and sets a limit on power. Judicial review rests on constitutionalism²⁹: the idea of limited government. Judicial review is usually defended as an offshoot institution founded on constitutionalism.³⁰ Once the political system accepts the idea of limited government and endorses supremacy of the constitution, one needs to have institutional safeguard to enforce the supremacy clause against abusive government. The supremacy clause makes the constitution *justiciable* and judicial review is the means to enforce it. Furthermore, there are fundamental values to the democratic enterprise that cannot be amended or destroyed even by the majority government, for example human rights. Judicial review ensures that those fundamental values are not violated by a current majority in parliament.

systems aim to ensure political, economic and social equality of all citizens regardless of differences in race, language and class. The focus is the enforcement of socio-economic rights and the system is not limited to the protection of civil and political rights as understood in the old (narrow) constitutionalism. Yet in both countries the promise of transformative or positive constitutionalism has faltered after decades and the de-colonial critique accuse both constitutions as systems that promote the few rich class and neo liberal interests.

²⁷ N.W. Barber, *The Principles of Constitutionalism* (Oxford: Oxford University Press, 2018): 6.

²⁸ Francis Fukuyama, *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy* (New York: Farrar, 2014), chapter one.

²⁹ See for details Christopher Wolfe (n 13); Ahron Barak, *The Judge in a Democracy* (Princeton: Princeton University Press, 2006).

³⁰ Barak (n 29).

The increased role of courts in constitutional adjudication in most advanced countries often through constitutionally entrenched human rights, their enforcement through strong courts with judicial review and endorsement of constitutionalism limiting the notion of parliamentary supremacy to protect political and ethnic minorities, individuals and ideas from majority tyranny: democracies own excess has been significant after the Second World War (WWII).³¹ Courts with judicial review insulated from political pressures are tasked to enforce the rights. Over the last three decades parliamentary supremacy has given way to constitutionalism in Canada (1982), Israel (1992), New Zealand (1990) and UK (1998).³² As Hirschl wrote, ‘there is now hardly any moral, political, or public policy controversy in the new constitutionalism world that does not sooner or later become a judicial one. This global trend towards the expansion of the judicial domain is arguably one of the most significant developments in late twentieth and early twenty-first century government.’³³

If one accepts the idea of government whose powers are limited and the supremacy of the constitution then judicial review is an institutional mechanism for ensuring constitutionalism and it is a product of the constitution itself. It is the constitution, not the Court that declares itself to be supreme and that sets a limit on majority by establishing constitutional courts and human rights as limits to power. Judicial review is an institutional limit to majority rule. To the extent that the decisions of the Supreme Court are undemocratic, it is not because of the judiciary but because of the nature of the limits of constitutionalism set to democracy. Indeed the counter majoritarian difficulty has its own limitations. It misunderstands what democracy is. In the first place, it confuses democracy with the power of elected officials. There is no genuine democracy even though officials have been elected in an otherwise fair election unless voters have had access to the information they need so that their votes can make knowledgeable choices rather than merely manipulated responses to advertised campaigns. Citizens in a democracy must be able to participate in government not merely during elections but constantly through informed and free debate about their governments performance between

³¹ This development is criticized by other experts for installing *juristocracy*, that is, transfer of significant amount of power (shift of policy making) from political institutions to courts. See Hirschl (n 10): 78.

³² Hirschl (n 10): 78; Ginsburg (n 7): 1–12.

³³ Hirschl (n 10).

elections. Those evident requirements suggest what countries have long ago realized that democracy needs to be constrained in certain ways in order that democracy be genuine rather than sham. The argument that a bill of rights would be undemocratic is therefore not only wrong but the opposite of the truth. Majority's power to rule is limited. So the argument from democracy even suggests the need for bill of rights and judicial review. Constitutionalism is thus the basis and conceptual framework for the idea of constitutional review.

Despite the above criticism however the fact that American courts engage themselves in the resolution of 'hard cases' with some policy implications such as abortion, affirmative action, electoral redrawing, presidential elections, flag burning indicate that the Supreme Court does make controversial decisions with policy implications.³⁴ We should note strong judicial review and the associated risk of *juristocracy* is one option but certainly not the sole option.

6.2.2 *Human Rights*

Furthermore, short of judicial supremacy/activism, there is a wide spread consensus particularly after the WWII that recognizes courts as important institutions in the settlement of disputes related to the scope and limitation of rights. In this regard Stone and Mathew wrote:

The rights-based model has no serious rival today. Of existing states, 183 (94 percent) have constitutions containing a charter of rights. In the 1985–2010 period, 114 new constitutions entered into force (not all of which have lasted), and we have reliable information on 106 of these. All 106 new constitutions contained a catalog of rights, and only five failed to establish

³⁴ *Bush v. Gore*, 531 US 98 (2000) is a recent example. Even in such highly contested decisions a survey often finds that ordinary citizens have faith in the judiciary than in political institutions where opinion polls indicated 60% wanted the Supreme Court to settle the controversy with only 38% indicating for Congress. Gerhard Vander Schyff, *Judicial Review of Legislation: A Comparative Study of the UK, the Netherlands and South Africa* (Dordrecht: Springer, 2010): 62. Important constitutional/political changes also happened outside of the Supreme Court like the new deal reform (through the President's office), and the emergence of political parties.

a judicial mode of rights protection (North Korea, Vietnam, Saudi Arabia, Laos, and Iraq).³⁵

Indeed enforcement of human rights is one of the key foundations of constitutional review particularly after WWII. At its core the non-instrumental justification that argues that citizens have the right to be heard against grievances caused by governments and the latter has duty to provide reason for its action. The state must engage with its citizens when its action impact rights.³⁶ Tom Ginsburg captures this development very well:

Postwar constitutional drafting efforts focused on two concerns: first, the enunciation of basic rights to delimit a zone of autonomy for individuals, which the state should not be allowed to abridge; and second, the establishment of special constitutional courts to safeguard and protect these rights. These courts were seen as protecting democracy from its own excesses and were adopted precisely because they could be counter-majoritarian, able to protect the substantive values of democracy from procedurally legitimate elected bodies.³⁷

As to why human rights are constitutionally entrenched and enforced through judicial review, Stone and Mathew provide the concept of ‘incomplete contracting’—a concept that focuses on rights as a specific form of insurance. Each political actor in the constitution making process ‘wants to constrain opponents when they are in power, in part, through rights and judicial review. The resulting constitution thus creates two public goods: (i) a set of enabling governmental institutions, tied to elections, and (ii) a set of constraints, tied to rights’ enforceable through judicial review. It is incomplete because the *precise content, scope and limit* of a particular right though vaguely defined in the constitution is yet to be *defined* by the constitutional or supreme court.³⁸

³⁵ See Alec Stone and Jud Mathew, *Proportionality, Balancing and Constitutional Governance: A Comparative and Global Approach* (Oxford: Oxford University Press, 2019): 10–11.

³⁶ See for details Dworkin (n 13); see also Alon Harel and Adam Shinar, ‘The Real Case for Judicial Review,’ in Erin Delany and Rosalind Dixon eds., *Comparative Judicial Review* (Cheltenham: Edward Elgar, 2018): 14.

³⁷ Ginsburg (n 7): 2.

³⁸ See Stone and Mathew (n 35): 19.

Constitutional courts play a critical role in enforcing constitutionally entrenched human rights and in limiting the power of public institutions, a key challenge in Africa. ‘Rights oriented judicial review’³⁹ that might take two forms (individual and minority rights) authorizes constitutional courts to strike down a law or decisions of the executive, if it violates constitutionally entrenched rights. In India, the Supreme Court has through what it calls progressive interpretation of rights, introduced a broad interpretation to the right to life. Article 21 of the Constitution stipulates, “No person shall be deprived of his life or personal liberty except according to procedure established by law.” The Supreme Court interpreted in 1970, that the expression ‘procedure established by law’ to mean the procedure be ‘right, just and fair.’ The Court interpreted the right to life to include the right to health, the right to livelihood, the right to free and compulsory education up to fourteen years of age, the right to an unpolluted environment and to clean drinking water, the right to shelter and the right to speedy trial. The Court extended the meaning of life by, among other things, reading non-justiciable directive principles of State policy into fundamental rights. The logic of the Court seems—what is the right to life without decent shelter, right to food and access to school? By doing so the Court has broadened the scope for judicial review although of course whether the Court or the political institutions should deal with directive principles remain contested.⁴⁰

Some political systems still count on their parliaments⁴¹ for the protection of rights, but even then there is move either towards the constitutional entrenchment of rights that gives some space to the judiciary as in Canada since 1982 or are falling into a sphere of influence by supra national institutional protection of the human rights of citizens (UK).⁴² Other parliamentary systems have gone further not only by constitutionally entrenching rights but also establishing Constitutional courts. In parliamentary systems where parliament enjoyed supremacy

³⁹ Waldron (n 13).

⁴⁰ Allan R. Brewer-Carías, *Constitutional Courts as Positive Legislators: A Comparative Law* (Cambridge: Cambridge University Press, 2011): 60–61.

⁴¹ Australia and New Zealand do not have constitutional entrenched rights. The UK was alone to insist on parliamentary supremacy with no judicial review over its acts but that was only until 1998. With the coming into effect of the 1998 Human Rights Act in 1998, courts are slowly asserting some rights over parliament. Dworkin (n 13): 355.

⁴² Ginsburg (n 7): 1–15.

for long, the core of the democratic principle initially aimed at *limiting the monarchy* that was a threat to liberty. The aim was to subject the monarchy to political control. Parliament was for long allowed to enjoy supremacy over other branches and no institution was allowed to override it (some call this old constitutionalism).⁴³ Yet this was an incomplete process in the evolution of human rights. With time, new threats emerged from fascist regimes that indicated that even *elected governments* can go wrong and abuse human rights. This was the main reason that gave birth to the emergence of constitutional courts in many parliamentary systems in Europe following WWII. There emerged the need to protect democracy from its own excess. The effect was the emergence of the international human rights and constitutional supremacy with constitutional courts guarding human rights against the state (new constitutionalism).⁴⁴ Guarantee and enforcement of human rights has since then been core function of constitutional/supreme courts.⁴⁵ This development somehow limited parliamentary supremacy that traditionally required regular courts to obey its law. With the emergence of constitutional courts, entrenched bill of rights and constitutions that are supreme, parliamentary supremacy gave way to constitutionalism with judicial review as a means to enforcing it.⁴⁶

⁴³ Alec Stone Sweet, 'Constitutional Courts and Parliamentary Democracy,' *West European Politics* 25:1 (2002): 88; The idea of old and new constitutionalism is also understood by some differently. Negative constitutionalism some argue focuses on settling limit to power mainly through judicial review, written and supreme constitution and separation of powers that assumes minimalist state role. The focus is on civil and political rights that often require state inaction. As such it aims to prevent the state from acting. It sets limit on arbitrary state power. The state is understood as a source of fear, not hope. Positive or new constitutionalism implies the state should have effective institutions to deliver common good, for example, enforce socio-economic rights such as access to education, health and housing. As such the state is source of hope that ensures its citizens wellbeing, not fear. See N.W. Barber (n 27): 1–9.

⁴⁴ Donald Horowitz, 'Constitutional Courts: A Premier for Decision Makers,' *Journal of Democracy* 17:4 (2006): 127. The new constitutionalism may also imply the inclusion of social and economic rights in the constitution that later gave wide discretion to judges in enforcing them.

⁴⁵ Doreen Lustig and J.H.H. Weiler, 'Judicial Review in the Contemporary World: Retrospective and Prospective,' *International Journal of Constitutional Law* 16:2 (2018): 329.

⁴⁶ Allan R. Brewer-Carías, *Judicial Review in Comparative Law* (Cambridge: Cambridge University Press, 1989).

There is a very good reason for the above development. Political institutions such as parliament and the executive are the articulators of majority will. These institutions had to be reminded of the limit of their powers. This is the essence of constitutionalism and of the entrenchment of rights and freedoms in particular. Democracy is more than respecting the majority will. Reducing the risk of majority tyranny is also vital. Political majority is capable of looking after its own interests. They have the political institutions at their disposal. Thus the need for an independent, impartial, non-majoritarian institution to polish, monitor and enforce human rights emerged. This does not necessarily imply judicial supremacy in the determination of meaning of rights.⁴⁷ Obviously there is no single canonical understanding of rights. People do disagree on the meaning of rights. The fact that rights and freedoms are entrenched in the constitution does not answer the disagreement over rights and that often involves major issues of political philosophy on specific rights. There is certainly a debate between courts and political institutions. The argument is simply that the courts share and should remain as key institutions in the determination of meaning of rights. In as much as some question judicial supremacy, one could also question political supremacy over the meaning of rights. Indeed political institutions are first suspects when it

⁴⁷ Dworkin (n 13): 142. Overall however, the Supreme Court played and continues to play a significant role in the resolution of constitutional disputes what is contested is its role in policy making and the degree to which it should be tolerated. Others like Christopher Wolfe (n 13): 200 make distinction between traditional and modern judicial review. The former implies that judicial power is never exercised for the purpose of giving effect the will of the judges but for the purpose of giving effect the will of the legislature, the constitution and the people as contained in the law. Modern judicial review of the 1960s and 1970s of the Warren and Burger Courts during the era of Civil Rights movement, the Supreme Court used its power as a tool for achieving social transformation in society when the political institutions failed to do so. The Warren Court may be accused of being activist Court but when the majoritarian political institutions failed to rectify age old discriminatory practices against African Americans and when the Civil Rights Movement has already laid the ground for the right to equality, the Court presented itself as a forum for groups that were excluded from the elected branches of government. The long term effect was to open the political process for fuller participation. Thus an undemocratic institution may actually be protecting and expanding democracy, the areas of civil liberties and rights. That was the essence of Justice Stones in the *Carolene* products in footnote 4 (also called Stones preferred position doctrine) realized during the Warren Court.

comes to rights of citizens and of minorities not fairly represented in the democratic process.⁴⁸

Time and again history has proven to us that taking refuge in the will of democratic majority is no longer good enough. The majority shows little incentive towards particular minorities. In multi-ethnic federations indeed boundary of sub units are at times reorganized to allow minorities become a majority in their territory and exercise self-government.⁴⁹ Minorities would then be politically empowered and the Court can serve as a guardian when national level majorities threaten the right of such minorities violating the constitutional pact. The idea of a Court guarding minority rights by polishing the democratic process was clearly articulated in the famous *Carolene Products* case footnote 4 further elaborated in Ely's *Democracy and Distrust* that draws from the second and third provisions of the *Carolene Products* footnote 4.⁵⁰ The Supreme Court should interpret the ambiguous clauses of the constitution, particularly the equal protection clause to ensure that the democratic process is kept open (to be more inclusive) to all and that prejudice against particular minority groups does not contaminate the legislature.⁵¹ The Court emphasized the prejudice on the side of majority against what it labelled as 'discrete and insular minorities,' (not only are political minorities but also are minorities not represented owing to their number/size or ethnic group). They are isolated from the rest of the community because they do not

⁴⁸ See for details Ginsburg (n 7): 58.

⁴⁹ Belgium, India, French speaking province of Canada and Ethiopia are examples. In India the following ethno-linguistic groups have their own states. Hindi, Bengali, Telugu, Marathi, Tamil, Gujarati, Kannada, Malayalam, Oriya, Punjabi, Assamese, Manipuri, and Kashmiri. See Sujit Choudhry, 'Bridging Comparative Constitutional Law: Constitutional Design in Divided Societies,' in Sujit Choudhry ed., *Constitutional Design in Divided Societies* (Oxford: Oxford University Press, 2008).

⁵⁰ *United States v. Carolene Products co.* 304 US 144 (1938). The argument in this section that builds on the role of the courts in the enforcement of constitutionally entrenched rights needs to be taken with a grain of salt. For ages the US Supreme Court as in *Dred Scott v. Sanford* (1857); *Plessey v. Ferguson* 163 US 537 (1896) failed to serve that very purpose. This was to be reversed in *Brown v. Board of Education* that ended the 'separate but equal' doctrine. Until then it was legal to segregate white and black students. Yet after the events that led to the two world wars and following the human rights revolution thereafter, the role of courts both at national or supranational level has increased significantly.

⁵¹ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard: Harvard University Press, 1980): 12–13; 75–77.

share many interests with the majority and have little avenue to protect their interest.⁵² Indeed this is a critical problem in the Ethiopian federal system where regional state minorities continue to suffer because they are under the mercy of local majorities with little incentive to address their concerns related to political representation at sub state level, claims for local government and use of distinct language. In the *Carolene Products* case footnote 4 the Court stated that it should strictly enforce the constitution when the legislation in question clearly infringed a specific right identified in the text, had the effect of excluding citizens from the political process or was the result of prejudice against discrete and insular minorities. This suggests that there was a special need for the court to intervene when the democratic process remains reluctant in addressing demands of such distinct groups.⁵³ Judicial review to protect individual rights including minorities is vital because it is least likely to be protected by the democratic process. Majorities have an incentive to deprive their opponents of their political rights because this helps the majority to retain power.⁵⁴

6.2.3 *Institutional Advantage and Professional Competence*

In healthy and working political systems, courts, compared to political institutions are relatively insulated from the day to day political heats, thus the metaphor: ‘Peter Sober’ (courts) vs. ‘Peter drunk,’ (the political institutions as they regularly face the electorate). Institutional advantage and professional competence of courts is another major justification for vesting the mandate of constitutional review to supreme courts or constitutional courts.⁵⁵ The argument that interpretation of law in general and constitutional law in particular should be left to trained elite of judges

⁵² Waldron (n 13): 1405.

⁵³ Steven Griffin, *American Constitutionalism: From Theory to Politics* (Princeton: Princeton University Press, 1996): 105, 159.

⁵⁴ Ibid.: 105.

⁵⁵ The argument that interpretation of law in general and constitutional law in particular should be left to trained elite of judges (institutional advantage of courts) whose professional task is to interpret the law goes back to Chief Justice John Marshall’s decision in *Marbury v. Madison* 5 US 137 (1803). See also *The Federalist Papers*, Number 78. Dworkin (n 13): 142. Peter Hogg, Allison Bushell Thronton, and Wade Wright, ‘Charter Dialogue Revised’—or ‘Much Ado About Metaphor’, *Osgoode Hall Law Journal* 45:1 (2007): 37.

(institutional advantage of courts) whose professional task is to interpret the law and resolution of disputes goes back to Chief Justice John Marshall's decision in *Marbury v. Madison* 5 US 137 (1803). Marshall argued judicial power to hold a law void for its incompatibility with the constitution is a necessary implication of the supremacy of the constitution. The life tenure of judges compared to the term limits of politicians, the autonomy and competence of courts and their insulation from the day today political heats, while office holders have to subject themselves to election every few years; that the judiciary has a self-correcting mechanism through the appellate structure when lower courts make mistakes in interpretation of the law constituted core argument. Interpretation of the law/constitution being a fundamental law is the proper and peculiar province of courts. It is emphatically the province and the judiciary to say what the law is based on text, original understanding or precedents.⁵⁶

A complementary to insurance theory, constitutionalism, institutional competence and rights protection is deliberative democracy.⁵⁷ Judicial decisions are not final but rather involve a kind of dialogue with political branches. The court is one among several actors that participates in governmental conversation. The court provides an alternative forum to the political institutions and can thus allow the articulation of views that would otherwise not be heard. Judicial review potentially expands the range of voices to include political minorities that are not fairly represented in the political process.⁵⁸ When political institutions remain reluctant to address issues related to political minorities, courts remain the last avenues for redressing right related grievances. They provide access to political minority. Such a role assumed by the courts is not necessarily counter majoritarian if seen democracy broadly and wisely. Democracy seen from its roots is not limited to majority rule but rule by the people that include the minority. Certainly those that are not fairly represented in the political process when given space through the judicial process particularly when political institutions dominated by one party remain reluctant fits well into the broader notion of democracy: *rule by the people*. The Supreme Court has a pluralist role. The sphere of government authority

⁵⁶ Dworkin (n 13).

⁵⁷ See for details Christopher Zurn, *Deliberative Democracy and the Institution of Judicial Review* (Cambridge: Cambridge University Press, 2007).

⁵⁸ See Ginsburg (n 7): 30.

is spread out to prevent the concentration of power. It provides interest groups to have access. Courts are seen as another outlet for the redress of grievances. The Warren Court may be accused of being activist Court but when the majoritarian political institutions failed to rectify age old discriminatory practices against African Americans and when the Civil Rights Movement has already laid the ground for the right to equality, the Court presented itself as a *forum* for groups that were excluded from the elected branches of government. The long term effect was to open the political process for *fuller participation*. The court ensured that the democratic process should be *inclusive*. Thus an undemocratic institution may actually be protecting and expanding democracy, the areas of civil liberties and rights. The last but not least justification for judicial review is linked to federalism.

6.2.4 *Umpiring Federalism*

Pushed by pressures from centrifugal forces, many countries have shifted from the centralized nation state to either a full-fledged federalism or some form of decentralized system over the course of the last four decades.⁵⁹ The allocation of powers between the federal government and sub units raises questions related to the manner in which the system aims to address disputes related to the respective competencies. States representation in federal institutions as well as disputes among the states themselves could also be a source of controversy. As the allocation of competencies is often constitutionally entrenched, sub units need institutional safeguard on their competencies to prevent federal government's unilateral violation of the constitutional pact. In emerging federations this is crucial and an integral element of federalism. Federalism is based on the rule of law and constitutionalism. The powers of the respective levels of governments are defined in the constitution but the powers are also limited. The guardian of the constitution ensures that the powers as defined and limited in the constitution remain enforced. Many federations in Africa including the Ethio-Eritrea federation (1952–1962) and collapsed because of central government's unilateral violation of the federal pact. The current Ethiopian federation suffers from extreme centralization and one party dominance and regional states continue to

⁵⁹ Ronald Watts, *Comparing Federal Systems*, 3rd edn (McGill: Queen's University Press, 2008).

struggle without much success to regain their constitutionally guaranteed autonomy.⁶⁰ Keeping the federation on balance in line with the federal spirit requires a supreme constitution and an impartial guardian in the form of highest court be it supreme or constitutional court that interprets it.⁶¹ Thus crucially important in a federation is the presence of a body that umpires disputes concerning the constitutionality of laws in general and the division of powers in particular. From the principle of constitutionally guaranteed division of power and the supremacy of the constitution follows that the last word in settling disputes about the meaning of the division of powers must not rest either with the federal government alone or with the states.

As noted already, constitutionally entrenched division of power is the hallmark of federations.⁶² However, the division of powers between the federal government and the states cannot be delineated in such a way as to avoid all conflicts.⁶³ As R. Davis notes the ‘division of power is artificial, imperfect and a generalized skeletal thing. Political life cannot be perfectly or permanently compartmentalized. The words can rarely be more than approximate crude and temporary guides to the ongoing or permissible political activity in any federal system.’⁶⁴ While some insist on ‘fixed federalism,’⁶⁵ that is, the division of power is static and the Court should strictly enforce it, in reality the division of powers stipulates general principles that are far from clear leaving room for interpretation. Certainly disputes about the terms of the division of power are bound to

⁶⁰ Assefa Fiseha, ‘Federalism, Development and the Changing Political Dynamics in Ethiopia,’ *International Journal of Constitutional Law* 17:1 (2019).

⁶¹ Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 8th edn (London: Macmillan, 1915): 140.

⁶² K.C. Wheare, *Federal Government*, 4th edn (London: Oxford University Press, 1963): 60–61.

⁶³ Article 138.2 of the Austrian Constitutional Court stipulates “The Constitutional Court furthermore determines at the request of the Federal Government or a state Government whether a legislative or executive act is part of the competence of the Federation or the States.” This means that the Constitutional Court has the final say on the question of whether ultimate authority belongs to the Federation or to the states.

⁶⁴ Rufus Davis, *The Federal Principle: A Journey Through Time in Quest of Meaning* (Berkeley: University of California Press, 1978): 143.

⁶⁵ See Editor’s note, *Publius: Journal of Federalism* 47:1 (2017): 4 where they mention the debate between fixed and flexible federalism in relation to division of powers in a federation.

occur. Besides, adaptation and the need to adjust the division of power to cope with the new, the unforeseen and the unintended remains crucial and interpretation is one of such methods.

Time and space do not permit a comprehensive study of constitutional review of legislation in various federal systems. Yet in light of the relevance of this enterprise in consolidating the federal system, an attempt is made here to link federalism and the role of the judiciary, albeit with the main emphasis on the Ethiopian experience.⁶⁶ As noted in chapter four, South Africa and Kenya have strong judicial system that umpires intergovernmental disputes. Devolution in both countries is backed by the rule of law. Through the tribunal that interprets and adjudicates constitutional issues, federal systems have been able to promote legal uniformity in relation to federal laws.⁶⁷ Different courts that operate in a federation may interpret the constitution and federal law differently and that may cause legal anarchy. While laws issued by sub units will likely differ across the different states as part of accommodating diversity, uniform interpretation of the constitution and federal law throughout the federal system is vital to avoid inconsistencies and legal uncertainties. The highest tribunals of federal systems or the body that adjudicates constitutional issues play a critical role in this respect.

As already mentioned, one of the fundamental features of a federal system is the division of powers between the federal government and the states. Many constitutions also declare the federal constitution supreme. Two consequences follow from this: there must be an institution that enforces the supremacy clauses and there must also be an institution that takes care of the daunting task of demarcating the boundary of the powers of the federal government and the states. Federal constitutions do attempt to define the scope and powers of the two levels of government but there is bound to exist natural imprecision in the language of the constitution.⁶⁸ Suffice it to mention here the wide meanings given to 'interstate commerce,' 'implied powers' and the 'necessary and proper' clause by the

⁶⁶ See for example Vicki Jackson and Mark Tushnet, *Comparative Constitutional Law* (New York: Foundation Press, 1999): 190–206.

⁶⁷ See Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1989): 169; 312–313.

⁶⁸ 'Constitutional language is often imprecise or inconclusive, and the circumstances of its application often unanticipated or unforeseeable by its authors.' James Brudney, "Recalibrating Federal Judicial Independence," *Ohio State Law Journal* 64:1 (2003): 175.

United States Supreme Court. Through the mechanism of constitutional adjudication then federal integration is given a more concrete meaning.

In a federation, not only should the interpreter be autonomous but should also be *independent* of the federal and state governments. K. C. Wheare wrote ‘some impartial body, independent of the general (federal) and regional governments, should decide on the meaning of the division of powers.’⁶⁹ Drawing from a rich comparative study Aroney and Kincaid as well conclude ‘federation’s Supreme Court is inevitably a creature of the federal government. It is not a true third party neutrally umpiring disputes between the federation and its constituent polities.’⁷⁰ Shapiro shares the same conclusion: ‘A federation’s constitutional court is in an uncomfortable situation for two reasons. First, it is called upon to referee between two governments, a pygmy between two giants. Second, it is actually one of the *limbs* of one of the giants,’ that of the federal government. This compels one to ask, how do we mitigate this risk and protect autonomy of sub units from being violated by the federal government?⁷¹

As will be illustrated later, the interpreter may tend to adopt either pro federal government or pro state position. This affects the federal balance negatively, if such position emanates from political inclination of judges rather than the federal idea. Ideally, the Court should be composed of experts reflecting the diverse interests that exist in the country. Requiring the nomination process in the federal parliament subject to regional state approval has the potential to reduce the risk of centrist judges filling the highest court. In Canada, three of the nine Supreme Court judges come from Quebec—Canada’s main driver of sub unit nationalism. In Belgium, there are six French speaking and equally six Dutch speaking judges in the Constitutional Court.⁷² In Germany, the Bundesrat that represents the states (Länder) nominate half of the judges of the Constitutional Court. Not surprisingly, both the German and Belgian Constitutional Courts are less centralist compared to courts in other federations.⁷³ The German

⁶⁹ Wheare (n 62): 66.

⁷⁰ Aroney, Kincaid (n 12): 488.

⁷¹ Martin Shapiro, ‘Judicial Review in Developed Democracies,’ in *Democratization and The Judiciary: The Accountability Function of Courts in New Democracies*; Siri Gloppen, Roberto Gargarella, and Elin Skaar eds. (London: Frank Cass, 2004): 6.

⁷² See Aroney, Kincaid (n 12): 20.

⁷³ Nicolas Aroney and John Kincaid, ‘Comparative Observation and Conclusion: Courts in Federal Countries,’ in Nicolas Aroney and John Kincaid eds., *Courts in*

constitutional Court in its 2004 decisions⁷⁴ has circumvented an established trend within the federation that extended enumerated powers of the federal government through constitutional amendment. According to 'Its new interpretation of the necessity clause of Article 72, Section 2 favoured the Länder as the Court allowed the use of concurrent powers by the federal parliament only to avoid the problematic consequences of a fragmentation of the law or if there were considerable disadvantages for the economy and serious disparities between the Länder.'⁷⁵ This position of the Court triggered constitutional amendment in 2006 that resulted in transfer of mandates to the Lander (amendment to Article 72) in the concurrent list. Later political developments (2009 and 2017) within the German federation however show shift towards unitary than federation.⁷⁶

6.3 THE ROLE OF THE INTERPRETER

6.3.1 *Linking Constitutional Adjudication and Constitutional Governance*

Understanding the major roles of the interpreter and its links with constitutional governance and rule of law is critical particularly in developing countries.⁷⁷ As will be illustrated later, those engaged in constitutional interpretation often fail to grasp their role and end up becoming subservient to those who hold power. Among the most essential roles of the interpreter is ensuring that power is exercised for public purposes and safeguarding constitutional governance. That is ensuring that public institutions established by the constitution exercise their mandate as defined in

Federal Countries: Federalists or Unitarists? (Toronto: University of Toronto Press, 2017): 488–489.

⁷⁴ Geriatric Nursing Act case (2002), bverfGE, 106, 62; Fighting Dogs case bverfGE 110, 141; Junior Professor case (2004), bverfGE 111, 126; Student Fees case (2005), bverfGE 112, 226.

⁷⁵ Arthur Benz, 'The Federal Constitutional Court of Germany: Guardian of Unitarism and Federalism,' in Nicolas Aroney and John Kincaid eds., *Courts in Federal Countries: Federalists or Unitarists?* (Toronto: University of Toronto Press, 2017): 217.

⁷⁶ See Roland Sturm, 'Unitary Federalism-Germany Ignores the Original Spirit of Its Constitution,' *Revista d'estudis autonòmics i federals (REAF) Journal of Self Government* 28 (2018): 17–46.

⁷⁷ Theunis Roux, 'The South African Constitutional Court's Democratic Rights Jurisprudence,' *Constitutional Court Review* 5:1 (2013).

the constitution for public purposes while respecting the limits of power expressed in the form of enforceable human rights, checks and balances and the rule of law. For purposes of this chapter, constitutional governance refers to the effort to institutionalize power and limit it through constitutional adjudication. One of the daunting tasks in achieving this goal is to shift the exercise of power from personal or party rule to institutions by enforcing the supreme law. Federalism or devolution is rule based system. The constitution defines the competence of the different branches and levels of government and there by determines the limits of power. One has thus to find ways to handle issues that arise when there emerges a violation on the limits of power.

6.3.1.1 *Guardians of the Constitution, Institutionalize Power and Limit Personal Rule*

As noted already, ensuring that power is exercised for public purposes and safeguarding constitutional governance is key role of the interpreter. One of its major tasks is to *shift* the exercise of power from personal rule to institutions by enforcing the supreme law. While the link between constitutional adjudication and governance and in particular the use and exercise of power is a major issue in general, it becomes so peculiar in the African context. Max Weber has explained the nature of patrimonial regimes long before Europe shifted to modern state that respects rule of law and exercises checks and balances among the different branches of governments to ensure that power is used for public purposes.⁷⁸ The modern state is impersonal state in which the relationship between the ruler and the citizen is not based on personal ties but on merit and technical knowledge. In the patrimonial regimes however, the polity remains the personal property of the ruler that could be a big man, an emperor or one party. According to Fukuyama in patrimonial regimes ‘the state administration is essentially an extension of the ruler’s house hold.’⁷⁹ As such there is little distinction between private and public sphere. Public office is used to promote personal and factional interests. In today’s global world, most African states would not call themselves as patrimonial as there is formal pretension to adopt constitution with some element of

⁷⁸ Max Weber, *Essays in Sociology* (New York: Oxford University Press, 1946).

⁷⁹ Francis Fukuyama, *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy* (New York: Farrar, 2014).

separation of powers and claim for the rule of law. Yet behind such crude formality, the use of public power for private gains and its exercise based on personal, party or ethnic ties is pervasive. The merger between crude formality and patrimonial practice is referred by some as neo-patrimonial regime or the extractive state.⁸⁰ The political elite in power continues to control state institutions and through that the massive resources that it commands creates patronage at different levels. In what Alex De Waal calls 'political budget' the rulers spend a big part of the country's resources to pay for political loyalist with little left for public goods.⁸¹ Informal and personalized power, the conception of power and the country's asset as if it is the ruler's private affair, the resources at its disposal creates favorable condition for the incumbent to win elections.⁸² Beneath the formal institutions, the ruling party (imperial president, one or dominant party or big man) distributes the spoils of office to its supporters and punishes dissenters.⁸³ Despite constitutional principles, it also determines who may be engaged in politics and the space available for such engagement, most often used tool being to divide and rule the opposition and weaken it. The informal networks weaken formal institutions undermining their ability to deliver impersonal public services.⁸⁴ Thus, to ensure that political power is used for public purposes, there is a need to shift the locus of power from personal or party level to impersonal institutions and regulate it through the rule of law and the system of checks and balances. Constitutional adjudication either through the Supreme Court or constitutional Court is time tested institutional guarantee against the use of power for personal use. It is a key tool to regulate and institutionalize power.

The role of the interpreter in shaping and regulating the political process and serving as guardian of the constitution is thus of paramount

⁸⁰ Daron Acemoglu and James A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (New York: Crown, 2012).

⁸¹ Alex De Waal, 'When Kleptocracy Becomes Insolvent: Brute Cause of the Civil War in South Sudan,' *African Affairs* 113:452 (2014): 347–369.

⁸² Goran Hyden, *African Politics in Comparative Perspective* (Cambridge: Cambridge University Press, 2006), 95.

⁸³ Michael Bratton, 'Vote Buying and Violence in Nigerian Election Campaigns,' *Electoral Studies* 27:4 (2008): 621–632.

⁸⁴ Patrick Chabal and Jean-Pascal Daloz, *Africa Works: Disorder as Political Instrument* (Oxford: James Currey, 1999).

importance. Firstly, most constitutions declare themselves as supreme. Constitutions are higher laws that establish main public institutions and define their mandates, yet they also set limits on power binding even elected legislators and ensuring basic rights to citizens and minorities. Their supremacy is reflection of their embodiment of the will of the people. Constitutions are authored not by majority or minority but by the people. Yet declaring the constitution to be supreme will be meaningless unless there is a means to enforce it. Thus Supreme courts or constitutional courts prime function is to ensure that the constitution remains supreme by declaring a law, decision of the government or a party as unconstitutional when it contravenes the constitution. As such they are *guardians* of the constitution. Without such institutional guarantee, the constitution, as is the case in many African countries becomes a dead letter only serving factional interests. It becomes as aptly described ‘constitution without constitutionalism.’⁸⁵ Nevertheless, it is vital to note that constitutional courts are subordinate to the constitution. Such bodies cannot assume a constituent power (that belongs to the people) and make changes or modifications to the constitution under the pretext of interpretation.⁸⁶

6.3.1.2 *Adapting the Constitution*

Constitutions are often assumed to serve for generations and contain general principles. The current generation may follow the procedures of amendment and adapt the constitution to fit the current situation. But this is often a difficult process. Alternatively, constitutional interpreters have found innovative ways of adapting the constitution to the current context. The principle of equality in the west was understood two centuries back to mean equality among white rich men only. It did not include women, the poor, blacks and other minorities.⁸⁷ Without amending the constitution, constitutional interpreters have over the years

⁸⁵ H.W.O Okoth-Ogendo, ‘Constitutions Without Constitutionalism: Reflections on an African Political Paradox,’ in Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, and Steven C. Wheatley eds., *Constitutionalism and Democracy: Transitions in the Contemporary World* (New York: Oxford University Press, 1993): 65–84.

⁸⁶ Brewer-Carías (n 40): 16, 20. In countries where constitutional courts ensure supremacy of international treaties (dealing with human rights such as European Human Rights Treaty) such courts also have mandate over conventions and treaties.

⁸⁷ Brewer Carías (n 40): 52.

changed the meaning of equality to apply to women, blacks and all human beings.⁸⁸ Federal governments mandate over defense may not have envisaged modern weapons such as nuclear power, use of drones, air force, space technology and other modern war fares. The freedom of expression/speech did not envisage the internet, Facebook, tweeter and other means of communication. In Germany, the Federal Constitutional Court (FCC) extended the right to confidentiality that was previously applicable to human beings to computers and information technology systems.⁸⁹ Interpreters have thus found ways of adapting the vague clauses of the constitution to meet current demands. It is here that some argue the constitution is not an archaic fossil but a *living* document. Adhering to the text of the constitution is vital but the text of the constitution is meant to be as understood today, not limited to the meaning assigned to it centuries ago. Adapting the constitution to meet demands of current generation is thus vital function of the interpreter. However as in the other roles, when is adapting the text an interpretation, the domain of law/judge and when is it new norm setting (judicial law/policy making, the domain of politics) remains controversial. Stone explaining this risk wrote on the *New York Times* ‘our fill in the blank constitution’⁹⁰ implying the content of the constitution is written by judges when they decide cases, as if it had no preset principles from the outset. The respective domains of law and politics and how they interact and influence one another is very complex and yet constitutional courts play crucial role in the process of constitutional adjudication. In the academic debate on interpretation, divergences exist between originalists (it has many varieties)⁹¹ who insist the interpreter should stick to the historically discoverable meaning of the constitution, teleological/harmonious

⁸⁸ *Brown v. Board of Education* of Topeka, 347 U.S. 483 (1954) ended segregation and the separate but equal doctrine. With respect to women, this was done earlier.

⁸⁹ See BVerf G, Reference n° 1 BvR 370/07 from February 27, 2008, available at http://www.bverf.de/entscheidungen/rs20080227_1bvr037007.html; I. Härtel, German National Report, 12.

⁹⁰ See Geoffrey R. Stone, “Our Fill-in-the-Blank Constitution,” op-ed, *New York Times*, April 14, 2010, p. A27.

⁹¹ Some insist interpreter to stick to the meaning of the text when adopted (strict legalism) while others are willing to refer to minutes and other documents to discover the meaning of the text. A few others refer to the meaning of the text at the time of interpretation, implying that its meaning evolves across time. Beyond originalists and the living tree, American judges refer to precedents while the German constitutional

interpretation⁹² and those that consider the constitution as a living tree⁹³ advocating for the role of the interpreter to adapt the constitution to changing circumstances.⁹⁴

6.3.1.3 *Safeguarding and Reinforcing the Democratic Order*

Another key role of the interpreter particularly with respect to Constitutional courts is shaping and safe guarding the democratic political order and in the end ensure a polity under rule of law.⁹⁵ This is not a claim to make courts as ‘democracy builders.’⁹⁶ To be sure democracy is not born in the courts. Democracy is about rule by the people and most of it happens outside the judicial premises but once the political process sets the direction for democratic rule, courts can play a role in reinforcing it. Alongside the institutions that administer elections courts can ensure that the process remains inclusive, free and fair. On their

court focuses on the purposive (fundamental principles implied in the text) interpretation. Others add proportionality and balancing to the list.

⁹² Decision of German Constitutional Court, Southwest State case, 1 BVerfGE 14, 32 (1951), reproduced in Donald Kommers, and Russel Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3rd edn (Durham: Duke University Press, 2012): 62–66. The Court stated on the need to focus on internal coherence and structural unity of the Basic Law, stating that ‘no single constitutional provision may be taken out of its context and interpreted by itself but must be interpreted in such a way as to render it compatible with the fundamental principles of the Constitution and the intentions of its authors.’

⁹³ For US cases on this concept see *Missouri v Holland* ‘The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.’ *McCulloch v Maryland* ‘it is a constitution we are expounding’, and his implication that constitutions cannot frequently be amended; they must be understood ‘to be adapted to the various crises of human affairs.’

⁹⁴ See A Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1998) for the former and W.J. Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge: Cambridge University Press, 2007).

⁹⁵ See for details Donald Kommers, ‘The Federal Constitutional Court: Guardian of the Basic Law,’ *The Annals of the American Academy of Political and Social Sciences* 603 (2006): 114–116.

⁹⁶ For the ambitious role of courts in democratization see T. Ginsburg, ‘The Politics of Courts in Democratization: Four Junctures in Asia,’ in D. Kapiszewski, G. Silverstein, and R.A. Kagan eds., *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge: Cambridge University Press, 2013); for the concept and critique see Tom Gerald Daly, *Alchemists: Questioning Our Faith in Courts as Democracy Builders* (Cambridge: Cambridge University Press, 2017).

own, courts guarantee that political rights are respected and enforced, state authority is subject to constraints, and power remains dispersed between different actors as envisaged in the constitution.⁹⁷ For example, the German Constitutional Court (FCC) has made key decisions that concern elections,⁹⁸ the role and status of political parties, issues related to dissolution of parliament,⁹⁹ foreign affairs (deployment of armed forces in foreign countries requiring legislative approval)¹⁰⁰ and monitoring of party finance, internal democracy with in parliament and ensuring role of small parties and demarcates mandates among branches and levels of government. As the Basic Law establishes political parties as major agencies of political representation (Article 21) and thus enjoy constitutional status, the FCC protects their role in the political process¹⁰¹ and can declare them as unconstitutional when political parties seek to threaten the democratic order.¹⁰² Afraid of return to fascism, the Basic Law under Articles 18 and 24 has stipulated that individuals and political parties that threaten the democratic order face the threat of forfeiting their rights and the constitutional court could declare such parties as unconstitutional and could be banned. Coined as *militant* democracy, the Court has express mandate to defend democracy from those that aim to threaten it.¹⁰³ The FCC resolves wide ranging politically delicate issues and as guardian of the Basic law, it ensures that the political system is governed by law. Thus courts can perform important functions in the consolidation and maintenance of democratic government. Many constitutional courts make

⁹⁷ Gerald Daly (n 96): 58.

⁹⁸ See Hessian Election Review Case (103 BVerfGE 111: 2001). The case according to Kommers is comparable to *Bush v. Gore* (531 U.S. 98 [2000]). While *Bush vs. Gore* remain contested, the FCC decision on a related matter is less contested in Germany.

⁹⁹ Dissolution Case II; see www.bverfg.de/entscheidungen/es20050825_2bve000405.html.

¹⁰⁰ See AWACS-Urteil BVferG, July 12, 1994, BVerfGE 90, 585–603. The FCC required the legislative body has to approve the deployment.

¹⁰¹ 4 BVerfGE 27: 1954.

¹⁰² See Communist Party case 5BVerfGE85, 139: 1956. Through the doctrine of Militant Democracy, the FCC can disqualify political parties when it thinks they are against democracy. Through this mechanism democracy defends itself from extremists.

¹⁰³ Justin Collings, *Democracy's Guardians: The History of the German Federal Constitutional Court 1951–2001* (Oxford: Oxford University Press, 2015): 38.

invaluable contributions to the establishment and maintenance of democratic institutions.¹⁰⁴ They provide a site for the enforcement of human rights and for the delineation of the powers between the branches and levels of governmental bodies.

By adjudicating constitutional questions and enforcing constitutional provisions, constitutional courts make the constitution a living document that shapes and directs the exercise of political power, rather than a merely symbolic or aspirational collection of fine phrases. They can contribute, in other words, to making a new regime not merely a democracy but a state governed by law. In many developing countries the idea of peaceful resolution of disputes and the institutionalization of power including the idea of resolution of horizontal and vertical disputes through independent and impartial bodies is more of a promise than a reality. Formal institutions are often side-lined by informal and patrimonial networks of the ruling party. As argued ‘constitutional courts in new or otherwise fragile democracies can play in preventing elected majorities from using their democratic mandate permanently to entrench themselves in power’¹⁰⁵ and reduce risks of authoritarianism. Issacharoff calls this role of constitutional courts as ‘hedges’ against majority authoritarianism.¹⁰⁶ The risks of extending presidential term beyond constitutional limits are all too familiar in the African context. Ethiopia and Somalia went through political turmoil in 2020 because the political elite in power decided to extend their term beyond constitutional limits and without ensuring broader consensus. On occasions, the interpreter plays a pivotal role against such efforts by enforcing term limits stipulated in the constitution. As will be illustrated later, the HoF simply allowed such extension and became part of the problem.

The key challenge in most parts of Africa and particularly in Ethiopia is the conception of the law in general and the rule of law in particular. The rule of law has been conceived as an *instrument* of power—where Emperors, dominant parties or elected leaders impose their own will on the people. It has been a means for consolidating power as has been the

¹⁰⁴ Horowitz (n 44): 127.

¹⁰⁵ Roux (n 77): 35.

¹⁰⁶ Samuel Issacharoff, ‘Constitutional Courts and Democratic Hedging,’ *Georgetown Law Journal* 99:961 (2011): 965.

case in Ethiopian history for long. For example, the emperor (1931–1974) wanted its two constitutions for legitimizing its power and for consolidating its dynasty, the military junta (1974–1991) for building ‘socialism’ and in the post-1991 Ethiopia for the developmental state that aims to accelerate economic growth under hegemonic party. Yet the rule of law apart from establishing public institutions also sets limits on public institutions and regulates power. The way political actors in power conceive the rule of law has serious implications. The rule of law is not an instrument of power and oppression. This conception is *rule by law*, not rule of law.

The rule of law as understood following WWII in countries that claim to have a written and rigid constitution implies that there is a substantive limit on political actors and public institutions.¹⁰⁷ The rule of law was transformed from mere formal legality which did not put limits particularly on the legislature to a substantive legality where it restrained the power vested in political institutions. In other words, the rule of law understood today puts a limit on the power of public institutions and ensures freedom to the citizen. The inclusion of human rights in post WWII constitutions, the establishment of constitutional courts that enforce the constitution and ensure that it is not violated by the political branches and the rigid procedure for amending constitutions was the culmination of the rule of law as understood in the second half of the twentieth century.

Overall, there is strong link between constitutional adjudication and governance. Governance in the form of federalism or devolution without institutional backup that keeps the constitutional balance is prone to political manipulation. Strong institutions that regulate political power in the form of Supreme or Constitutional Court are critical in shaping the behavior of political institutions giving life to constitutionalism and the rule of law.¹⁰⁸ As illustrated in the case studies that follow, this remains a major challenge in Ethiopia.

¹⁰⁷ Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004): 108–109.

¹⁰⁸ Horowitz (n 44): 126.

6.4 DIFFERENCES BETWEEN INSTITUTIONS: SUPREME COURT VS. CONSTITUTIONAL COURT

For historical and philosophical reasons, constitutions have adopted different mechanisms for reviewing the constitutionality of laws and decisions of government bodies. The (dis)trust that the states may have over the judiciary, the differing commitments to natural law or legal positivism and the variations in the applications of the notion of separation of powers have influenced, in one way or another, the nature and scope of the institution established to review issues of constitutionality.¹⁰⁹ Pre-WWII Europe trusted its legislature and led to the horrors and that in turn led to a shift in paradigm, for instance, in Germany and the rest of continental Europe to the evolution of Constitutional Court.

Broadly speaking, one can see two patterns regarding the institutions empowered to adjudicate constitutional issues. Many federal systems have vested this important power either in their ordinary courts or separate constitutional courts. Judicial review in either the Supreme Court or Constitutional Court model has become a wide spread practice particularly after the end of WWII (expanded to west Europe and Asia) and the Cold War (expanded to East Europe and beyond such as South Africa) so much so that a polity lacking either system is considered today *deficit* in terms of its commitment to the rule of law. By now, 90% of the countries across the globe have judicial review in their constitutions.¹¹⁰ In this model courts not only have the power to interpret the constitution, but are also and even more importantly entitled to decide on the conformity of the laws with the constitution. What is common in all is the fact that there is commitment to a 'higher law,' that reflects the society's fundamental values and a law that contravenes this higher law should cease to exist by some kind of procedure.¹¹¹ The systems do not accept the 'omnipotence' of positive law, but rather subject positive law to a superior law, the latter being constitutional law. Yet although constitutional review through the courts is based on the principle of subjecting legislation to a higher law, it essentially takes two distinct forms.

¹⁰⁹ Cappelletti (n 67): 115–131.

¹¹⁰ Stone and Jud Mathew (n 35): 10–11.

¹¹¹ Mauro Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis: Bobbs- Merrill, 1971): 15.

On the one hand, there is this diffused (decentralized) system also called the American- system that accords every branch of the judiciary the mandate to review the constitutionality of laws. In principle any court has the power to declare any law or decision of an executive body unconstitutional, if such a law or decision violates the constitution, final appeal being reserved to the federal Supreme Court. This has been the case since the famous decision of Chief Justice John Marshal of the US in *Marbury v. Madison*¹¹² in 1803. Since then many other countries have adopted it. Some traces of it also exist in Switzerland where the courts have the power to disregard cantonal laws. In Switzerland, judicial control is not, however, allowed over federal laws.

What characterizes the decentralized system of judicial review is the requirement of the presence of ‘real controversy and adverse parties’¹¹³ for the Court to decide the constitutional question. Besides, the US Supreme Court would insist that the matter must be justiciable and must not involve ‘political questions.’¹¹⁴ The ordinary courts decide constitutional issues in the process of disposing their routine function and review

¹¹² *Marbury v. Madison* 5 US 1 Cranch 137 (1803). For a detailed account of Judicial review and the background to the case see R. Carr, *The Supreme Court and Judicial Review* (Westport: Greenwood Press, 1970): 37–57.

¹¹³ This is judicially invented doctrine from Art. III of the United States Constitution. Thus the Court declines to give advisory opinions and to adjudicate what the German Constitutional Court does by way of abstract review. It is established that federal judges will not render an opinion or decide a case unless there is an actual dispute between litigants before the Court. The Court settles the adverse interests and the decision must have effect on the parties. The case is then said to be justiciable. It is one of the mechanisms of self-restraint developed by the Court over the years to avoid head on clashes with the other branches of the government. John Ferejohn and Larry Kramer, ‘Independent Judges, Dependent Judiciary: Institutionalizing Judicial Self- Restraint,’ *N. Y. U. Law Review* 77:4 (2002): 1003–1008.

¹¹⁴ This notion is far from clear but according to the opinion of the Court, the constitution has reserved certain kinds of questions for ultimate decision by the political branches and such questions are beyond judicial examination or considered as non-justiciable. It is in a way an aspect of judicial self-restraint. The Court removes some cases from consideration because the matter is deemed inappropriate for resolution by judges. But the borderline between what constitutes a constitutional or political case is never easy to draw. See for example Tim Koopmans, *Courts and Political Institutions: A Comparative View* (Cambridge: Cambridge University Press, 2003): 52, 98–104; The most often cited cases indicating the Court’s inconsistent interpretation on this matter is *Baker v. Carr*, 369 US 186 (1962) and *Bush vs. Gore*, 531 U.S. 98 (2000).

of constitutionality is, therefore, something that comes to the courts incidental to the case.¹¹⁵ In other words all courts are constitutional judges and can review the constitutionality of law and decide on the merit of the case although the Supreme Court retains the last word.¹¹⁶ The logic of the decentralized system in a nutshell is that it is the duty of the judges to apply and interpret the law and in so doing, if the judges find contradiction and inconsistency between two laws of different hierarchies; it is the duty of the judges to apply the higher law.¹¹⁷

On the other hand, the centralized system confers the power of reviewing the constitutionality of laws to separate and specialized constitutional courts.¹¹⁸ In other words, the Constitutional Court has monopoly and final say over the interpretation of the constitution.

¹¹⁵ For more comprehensive treatment of the differences see Brewer-Carias (n 40).

¹¹⁶ Ibid.

¹¹⁷ This was the essence of Hamilton's argument in the *Federalist Papers* No. 78, which John Marshall was to further develop in his famous *Marbury v. Madison* decision. Hamilton wrote, 'The Interpretation of the Law is the proper and peculiar province of courts. A Constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain it's meaning, as well as the meaning of any particular Act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.'

¹¹⁸ Countries opt for Constitutional courts due to several reasons: different application of the concept of separation of power that require regular judiciary to abide by law enacted by parliament as a result of supremacy of parliament dictating distinct constitutional court mandated to exercise constitutional review; the nature of the training of judges in continental Europe makes them stick to legal principles stipulated in written codes, the judge being mouth piece of the law that represents legislature's will, compared to judges in the common law that engage in setting precedents based on common law. This makes constitutional adjudication in civil law countries difficult that need innovative interpretation. Constitutional adjudication is considered as serious legal business and thus that are appointed to the court need to have rich practical and theoretical knowledge of law. Countries that have suffered under corrupt judiciaries (in France '*government of judges*' left its sad legacy over the judiciary—a distrust that went for centuries) as well want to start fresh when they attempt transition to democracy. Constitutional courts with limited years of service also prevent the political system from its link with old regime that judges in Supreme Court risks. For details see Cappelletti (n 67): 49–52; 137; for a very recent account of the personal background of the Chief Justices of the Supreme Court of the United States, indicating very rich experience in other branches of the government before assuming judicial position, indeed one was even a President of the country see William Rehnquist, 'Lecture: Remarks of the Chief Justice: My Life in the Law Series,' *Duke Law Journal* 52:4 (2003): 787–805.

Regular courts have no such mandate but they decide on the merit of the case that gave rise to the constitutional dispute once the constitutionality issues is addressed by the constitutional court. Unlike courts in the diffused system, constitutional courts can review legislation before it is enacted while under deliberation in the legislature preventing a potential unconstitutional legislation from causing harm. The ordinary courts in this system are bound by the legislation while the constitutional court can challenge it enforcing the supremacy clause of the constitution.¹¹⁹ While originating in Austria (Hans Kelson) in 1920, the idea attracted Germany's 1949 Basic Law and spread to Western Europe and later widely across East Europe, Asia (South Korea) and Africa (South Africa).¹²⁰

The German Constitutional Court is characterized by its distinctive constitutional jurisdiction separate from the regular judicial hierarchy. Unlike the US Supreme Court, the German Constitutional Court has an express mandate enumerated in the Basic Law (Article 93). Parties¹²¹ with legal standing must apply to it and thus the Court does not act on its own initiative. Its main task is to interpret the constitution and to ensure that every institution including political parties comply with it and enjoys wide respect in the system for its independence and impartiality.¹²² Unlike the US Supreme Court that is composed of nine judges that enjoy life tenure, the German Constitutional Court constitutes two senates each with eight judges appointed for twelve non-renewable terms¹²³. One of the Senates handles mainly basic human rights cases, otherwise known as constitutional complaints (Article 93)¹²⁴ that constitute 98%

¹¹⁹ Alec Stone Sweet, 'Constitutional Courts and Parliamentary Supremacy,' *West European Politics* 25:1 (2002): 80–81.

¹²⁰ Horowitz (n 44) 125.

¹²¹ Depending on the nature of the case applicants could be individuals, private associations, federal government (or any of its branches), state organs, members of parliament or political parties. Michael Lysander Fremuth, 'Patchwork Constitutionalism: Constitutionalism and Constitutional Litigation in Germany and Beyond the Nation State- A European Perspective,' *Dequesene Law Review* 49:2 (2011): 358–359.

¹²² *Ibid.*: 49.

¹²³ At least three judges in each senate come from other federal courts and have rich practical experience while the remaining judges are law professors. *Ibid.*: 350.

¹²⁴ The Procedure allows individuals to challenge constitutionality of public bodies infringement of rights after exhausting legal remedies.

of the Court's case. This is critical in terms of enforcing human rights ensured in the Basic Law when violated by public institutions once the applicant exhausts remedies elsewhere. The other Senate decides disputes between state organs about their respective competencies under the Basic Law (horizontal separation of powers)¹²⁵; disputes between the federal government and states regarding their respective mandates¹²⁶ and judicial review proceedings, that is, examining the constitutionality of laws enacted by the legislature either through concrete¹²⁷ or abstract procedure (the constitutionality of a law is questioned once adopted or before its enforcement in the absence of litigation).¹²⁸ Half of the judges of the constitutional court are selected for a single non-renewable term of twelve years, by a special electoral committee of the *Bundestag* while the other halves are selected by the *Bundesrat* and to that extent by the governments of the states. In both cases a majority of two-thirds is required which is impossible to arrive at unless there is a consensus among the major parties. Thus the federal government and the states have *influence* on the selection of the judges of the Court.

Despite the general features of constitutional courts mentioned above, there is significant variation even among constitutional courts in terms of their jurisdiction. Some assume mandates beyond resolution of constitutional disputes such as impeachment of political figures and lawfulness of political parties. In some countries, the Court can review on constitutionality of draft laws before a law is enacted engaging it to the partisan process of law making, in others the Court can only review after it is

¹²⁵ The applicants could be federal organs, the federal President, the two chambers, a minority in either chamber challenging decisions of the majority.

¹²⁶ Enumerated powers, concurrent powers, exclusive powers and residual powers mentioned in the constitution in a federation are prone to various interpretations in the process of exercising powers. The constitutional Court serves as an impartial arbitrator and as an avenue for peaceful resolution of disputes. The federal government or states can apply in this procedure.

¹²⁷ The referring court that handles the merit of the case must be convinced that the law in question whose constitutionality is under investigation violates the Basic law, mere doubt is not enough. Michael Lysander Fremuth (n 121): 368.

¹²⁸ The Court has mandate to review the constitutionality of federal law on appeal from a qualified parliamentary minority, the federal government, or a state government without necessarily having a case from an ordinary court. See Horowitz (n 44): 129; Michael Lysander Fremuth (n 121): 372–385.

enacted while in some others it can review in both cases. There is also variation on the parties that have access to it, tenure of the judges (judges in Constitutional Courts are appointed for non-renewable limited term ranging from 8–12 years), the effect of their decisions (in some cases the court may indicate ways to rectify the law found to be unconstitutional or even write it itself)¹²⁹ and whether such decisions can be reversed by legislative bodies or not.¹³⁰

The manner of appointment as well as some of its powers, makes the Constitutional Court to have a hybrid role: political and legal.¹³¹ Distinct from and independent of the ordinary courts, the Constitutional Court serves as a watchdog for the enforcement of the supremacy of the constitution. The Court as such does not involve itself in the ordinary settlement of disputes unless the case relates to a constitutional question. However, it does not restrict itself to constitutional issues emanating from specific cases. In the abstract review type, it can also decide differences of opinion or doubts on the compatibility of federal or state law with the Basic Law or tension between federal and state law upon the request of a few public bodies.¹³² Compared to the American Supreme

¹²⁹ For example Article 172 of the South African Constitution stipulates on powers of courts in constitutional matters as follows. (1) When deciding a constitutional matter within its power, a court: (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable, including (i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect. Brewer Carias (n 40): 96 wrote 'In general terms, in comparative law, three different situations can be distinguished: first are cases in which the Constitutional Court determines when an annulled legislation will cease to have effects at some point in the future; second are cases in which the Constitutional Court, by assigning retroactive or non-retroactive effects to its decisions, determines the date on which legislation ceases to have effects; third are cases in which the Constitutional Court, when declaring null and unconstitutional statute, decides to bring back previously repealed legislation.'

¹³⁰ Nevil Johnson, 'The Federal Constitutional Court: Facing Up to the Strains of Law and Politics in the New Germany,' in Klaus Goetz and Peter Cullen eds., *Constitutional Policy in United Germany* (London: Frank Cass, 1995): 132; Horowitz (n 44): 128.

¹³¹ Nevil Johnson (n 130): 132.

¹³² Candidates for public office, individual members of parliament seeking to vindicate their representative rights, federal or state government or one-third of the Bundestag's members can request for abstract review. See Basic Law Art. 93. For more on the German Constitutional Court see Rainer Arnold, 'The German Constitutional Court and its Jurisprudence in 1996,' *The Tulane European and Civil Law Forum* 11 (Winter 1996):

Court, the German Constitutional Court has an extensive and wide-ranging jurisdiction defined in the Basic Law. The source and authority of the Constitutional Court are relatively settled for there are clear constitutional provisions empowering it, whereas it remains disputed, at least on academic level, as to where the Supreme Court's power comes from and how it should be exercised. The Constitutional Court was deliberately introduced with the principal role of reviewing the constitutionality of laws, a pivotal role for protecting against the return of the evils and horrors of dictatorship. As a result, the challenges of 'judicial activism' are, broadly speaking, less serious in Germany than in the United States. The Constitutional Court is consciously designed to play an active role in its capacity as a guardian of the Basic Law. Its 'activism'¹³³ is thus often tolerated.¹³⁴

85–110; Philip Blair and Peter Cullen, 'Federalism, Legalism, and Political Reality: The Record of the Federal Constitutional Court,' in Charlie Jeffery ed., *Recasting German Federalism: The Legacies of Unification* (London: Pinter, 1999): 119–154; Lars Mammen, 'A Short Note on the German Federal Constitutional Court and Its Power to Review Legislation,' *European Human Rights Law Review* 6:4 (2001): 433–438.

¹³³ In the United States there is an ongoing debate on the role of the Supreme Court regarding judicial review: according to Henry Abraham, it is 'the most awesome and potentially the most effective power in the hands of the judiciary in general and the Supreme Court in particular.' Every Court in the United States has the power to declare unconstitutional and hence unenforceable any law, any official action and any other action by public officials that the Court deems to be in violation of the Constitution. In the area of constitutional interpretation, this raises concerns because it invalidates a law considered to be an outcome of a number of compromises between political actors in Congress. Thus there are those who contend that in exercising this important power the Courts must exercise 'self-restraint.' The Courts should remain faithful and adhere to the written constitution, only refer to the original intent as put by the framers, guided by strict construction of the text and give priority to political branches to act or not to act. More importantly, the Courts should not put their own personal preferences and philosophies under the pretext of interpretation. They should rather adhere to judicial precedents. On the other hand, there are those who contend that the Court should have some active role. Constitutions even aggressive role of the Court in regulating governmental laws and actions. They do not hesitate over the fact that the courts have some 'law-making' functions and hence at times prescribe policies. As a result, they come in a head-on clash with the charge that the judiciary usurps the function of other branches of governments. See Henry Abraham, *The Judiciary: The Supreme Court in the Governmental Process*, 10th edn (New York: New York University Press, 1996): 69–70; 90–91.

¹³⁴ Apart from this rather oversimplified difference there exist other deeper variations among the institutions. The extent of the tribunal's jurisdiction has already been briefly mentioned. In many cases not only has the Constitutional Court a clear mandate but it also does not shy away from considering cases, which the Supreme Court may consider

6.5 ETHIOPIA: FEDERALISM WITHOUT JUDICIAL REVIEW?

Ethiopia, unlike many other countries, has empowered its second chamber, the House of Federation (HoF), to adjudicate constitutional disputes and umpire federalism. The rationale for vesting the power of interpreting the constitution in the HoF, and not in the regular judiciary or a constitutional court as can be gathered from the minutes of the Constitutional Assembly is related to the framers view of the 'nature' of the constitution in general and to the role of the nationalities in particular. The framers thought that the new federal dispensation is the outcome of the 'coming together' of the nationalities.¹³⁵ Indeed, it is clearly stipulated in the constitution that the 'nations, nationalities and peoples are sovereign.' The Constitution is considered as the reflection of the 'free will and consent' of the nationalities. It is, in the words of the framers, 'a political contract' and therefore only the authors that are the nationalities should be the ones to be vested with the power of interpreting the constitution.¹³⁶ To this effect, the HoF that is composed of the representatives of the various nationalities is expressly granted the power to review the constitutionality of laws and resolve disputes between the federal and state governments.¹³⁷ The practice of constitutional interpretation in Ethiopia is thus distinct. The HoF currently has 153 members representing 76 nationalities indirectly elected by the states. The HoF is not part of the federal law-making process. A federal bill does not need the consent of the HoF to become a law. In terms of composition, Article 61(2) of the Constitution stipulates that 'each Nation, Nationality and

political. There are also deeper variations in the methods and doctrines of interpreting the constitutions. For more on these issues see Danielle Finck, 'Judicial Review: The United States Supreme Court Versus the German Constitutional Court,' *Boston College of International and Comparative Law Review* 20 (1997): 123–157; David Beatty, 'The Forms and Limits of Constitutional Interpretation,' *American Journal of Comparative Law* 49:1 (2001): 79–120.

¹³⁵ See Preamble to the constitution which begins by saying 'We the nations, nationalities and peoples....adopted this constitution. Also Article 8 which places sovereignty to the nations, nationalities and peoples.'

¹³⁶ See *Ye Ethiopia Hige Mengist Gubae Kale Gubae v. 4 Hidar* 14–20, 1987 E.C. (Minutes of the Constitutional Assembly, November 1994) discussions on Articles 59, 61 and 62.

¹³⁷ See Art. 62(1).

People shall be represented in the HoF by at least one member. Each Nation or Nationality shall be represented by one additional representative for each one million of its population.’ As a result, the nationality with the largest number of people has as many seats as its size may allow in the HoF. As of 2005, state governors, the highest political figures in the states, have been among the key members sent to represent the states and nationalities in the HoF and to decide crucial issues such as constitutional interpretation and the federal subsidy allocated to each state. Political reality¹³⁸ dictated by ethno nationalist based mobilization and ideological commitment seem to be the explanations for this distinct constitutional design.

Given that interpreting the constitution and resolution of constitutional disputes require technical legal expertise, the HoF is assisted by the Council of Constitutional Inquiry (CCI), a body composed of eight legal experts (two of whom are the President of the Federal Supreme Court and the Deputy) that are appointed by the president of the country and three members from the HoF itself. The role of the CCI is limited to providing advisory opinion to the HoF. The cases have to be first submitted to the CCI. The legal opinion along with the case is then finally submitted to the HoF for decision when the CCI thinks that the case calls for constitutional interpretation. The HoF has the discretion to adopt, modify or even reject the CCI’s opinion.¹³⁹

As will be illustrated below the above institutional design has resulted in a centralized federation that lacks judicial review leaving the system open for political manipulation by a dominant party despite the constitutions conception of the federation as compact between nations that would have logically implied a more decentralized federation accommodative of ethno national groups demand for more political autonomy and self-government, the core cause of Ethiopia’s age old political crisis and civil war.

¹³⁸ Its inclusion in the constitution, apart from the fact that it was a long held view of the EPRDF owing to its leftist inclination, was justified as a means for bringing national liberation fronts’ such as the Oromo and the Ogaden National Liberation Fronts’ with the agenda of secession to the negotiation table. It would have been difficult to persuade such parties join the TGE without the rights mentioned in Article 39.

¹³⁹ See Articles 82–85 of the Constitution.

Two trends seem to be emerging. Cases involving horizontal and vertical division of power (power politics) as well as when a citizen challenges public institutions for violation of rights, the HoF is prone to political manipulation as the HoF is a political body controlled by the same hegemonic party. In most other cases, the HoF has manifested some level of impartiality.

6.5.1 *Keeping the Federal Balance*

Among the key functions of the body that interprets the constitution is carefully demarcating the division of power between the federal government and the states. One of the important justifications for the introduction of the system of constitutional review is federalism. Impartial Courts assist in keeping the federation on balance through the tribunal that interprets and adjudicates constitutional issues.¹⁴⁰ Constitutions often state the general principles without going to details and this body plays a vital role in giving meaning to these broadly stipulated principles. Among the potential sources of controversies that need constitutional interpretation and demarcation by the HoF relate to the powers that are jointly (concurrently) given to the federal and state governments. While exercising their respective mandates both levels of governments often engage in expanding their power which gives rise to disputes.

6.5.1.1 *Concurrent Powers and Self-Government*

The Ethiopian Constitution stipulates various types of concurrent powers.¹⁴¹ One among such peculiar type of concurrent power separates legislative and administrative powers on a specific function between the federal and state governments. This feature of concurrency is provided for in Article 51(5) and Article 52(2) (d) of the Constitution. Article 51(5) of the Constitution authorises the federal government to *enact laws* regarding the utilization and conservation of land and other natural

¹⁴⁰ Cappelletti (n 67).

¹⁴¹ The constitution provides framework powers where the federal government stipulates general principles while leaving space for the states to fill in. It also provides for concurrent taxes where the federal government levies and collects taxes but the proceeds are shared between the two levels of governments based on a formula set by the HoF. The chapter on human rights is also concurrent mandate of the federal and state governments as it has been reproduced with minor adjustments in the nine regional state constitutions.

resources, historical sites and objects. Article 52(2) (d) provides the states with the power to *administer* land and other natural resources in accordance with federal laws. This would seem to imply that setting the norms related to utilization and conservation of land and other natural resources is a mandate of the federal government while implementing these norms and laws belongs to the states. Hence the Constitution separates the legislative and administrative aspects of the use of land and natural resource and divides it between the two levels of government. By so doing, it creates concurrent powers between the two levels of governments.

Accordingly, the federal government has issued several proclamations relating to the use of land by invoking Article 51(5) as its source of authority. These include, Proclamations 818 (2014),¹⁴² 721(2011) 574 (2008), 455 (2005) and Proclamation 89 (1997).¹⁴³ The first proclamation regulates all urban centers in the country including those falling within the mandate of urban local governments. The second proclamation deals with allocation of urban land on lease for ‘developmental activities.’ The proclamation broadly defines the ‘developmental activities’ and sets the maximum lease period for a specific ‘developmental activity’. It further regulates the manner in which the land lease rate is determined and evictions of illegal landholders are undertaken. The third proclamation regulates urban planning, while the fourth one deals with matters relating to rural and urban land expropriation. Based on these federal proclamations, the regional states, more specifically the cities in the regional states, allocate urban lands for development, prepare town planning, evict illegal landholders, and expropriate lands for development purposes. The new laws have blurred where the legislative power of the federal government ends and the administrative power of the states begins with respect to land and natural resources. The issue here is whether the power of the regional state to administer federal laws relating to the use of land also

¹⁴² Article 3 of Proclamation No. 818/2014 deals with Registration of Urban Land Holding in all urban areas across the country. Not only the mandate of states but also that of urban local governments have been expropriated by this proclamation.

¹⁴³ Federal Negarit Gazeta of the Federal Democratic Republic Ethiopia: Re-Enactment of Urban Lands Lease Holding Proclamation No 272 (2002); Federal Negarit Gazeta of the Federal Democratic Republic Ethiopia: A proclamation to provide for urban plans No. 574 (2008); Federal Negarit Gazeta of the Federal Democratic Republic Ethiopia: Expropriation of land holdings for public purposes and payment of compensation proclamation No. 455 (2005).

implies the setting of norms and law making including the issuance of secondary legislative power and, to that effect, whether the federal law should be limited to providing a general framework.

This was one of the issues in the case *Biyadglegn Meles & et al. v. the Amhara Regional State*.¹⁴⁴ The applicants in this case requested the CCI to declare that a proclamation issued by the Amhara state government to regulate the use of land be declared unconstitutional. This is because according to the applicants, the state contravened the federal Constitution by enacting the proclamation that discriminates a section of society since under the Constitution the power to legislate on the use of land belongs to the federal government. On the other hand, Proclamation 89/1997,¹⁴⁵ which was issued by the federal parliament, provided that the states may issue legislation regarding the use of rural land and lays the general framework for doing so.¹⁴⁶ Furthermore, the federal law has retroactively endorsed the state laws that were already enacted before its promulgation including the proclamation whose constitutional validity was in question. This raises the issue as to whether the mandate of the states extends to include enacting laws and if so whether administering implies the setting of norms. The CCI ruled that the proclamation was constitutional on two grounds: The first ground was that the matter regulated in the proclamation formed part of the residual power of the states. The second ground was that the Proclamation has been retroactively endorsed by the federal proclamation. By doing so, it somehow broadened the mandate of the states.

The dividing line between the legislative power of the federal government and the administrative power of the states was once again an issue with respect to a recently adopted federal proclamation; Proclamation 818 (2014). This proclamation regulates, among others, the registration of urban land by federal and regional cities. It in detail defines the urban

¹⁴⁴ *Biyadglegn Meles & et al. v. the Amhara Regional State* petition *Minzia* 30 1989 E.C. (unpublished).

¹⁴⁵ Proclamation No. 89/1997, 'Federal Rural Land Administration Proclamation,' *Federal Negarit Gazeta*, 3rd Year No. 54, Addis Ababa 7 July 1997; As a result it seems to have fallen into the category of framework legislation.

¹⁴⁶ Arts. 5 and 6 of Proc. 89/97 state some general conditions that the state law should comply with. It specifically requires the state law to comply with federal environmental policy, to respect women's rights, regulates the payment of compensation, and guarantee rights of the holder.

land registration procedure and the legal effects that emanate from such registration or the lack thereof. It also provides for the creation of urban land ‘registering institutions’ at regional level and defines the powers and responsibilities of these institutions and makes them directly accountable to a federal agency called the Federal Urban Real Property Registration Information Authority.

The constitutionality of some of the provisions in the draft proclamation were questioned when it was tabled for debate in the federal parliament. The issue was that some of the provision in the draft proclamation allow the federal government to play administrative role with respect to urban land registration and thereby encroaches into the powers of the regional states to administer federal laws relating to the use of land. The draft law apart from setting the law went further in creating a federal institution nationwide with a clear mandate of implementing and administering the federal law which apparently takes away the constitutional mandate of the states. The HoF however found the proclamation to be in accord with the Constitution. The reason was not however because the proclamation does not compromise the power of the regional states to administer the use of land. The HoF in fact admitted that some of the provisions in the proclamation actually encroach into the competences of the regional state to administer land. It however reasoned that the encroachment into the competences of the regional state was necessary for sustaining the economic union of the country as envisaged under Article 55(6) of the Constitution.¹⁴⁷

6.5.2 *Addressing Interregional State Disputes*

Under an apparent claim that addressing interregional state disputes have become difficult to manage and need ‘an expert’ based solution, the federal government established ‘Identity and Administrative Boundary Commission’¹⁴⁸ allegedly with country wide mandate but largely suspected to target Tigray and perhaps to make adjustments to the federal system identified by the centrist elite as the ‘main source of

¹⁴⁷ Ethiopian federal Democratic Republic House of Federation First Emergency Meeting January 2, 2014.

¹⁴⁸ See Proclamation 1101.2019, Administrative, Boundary and Identity Issues Commission; see also Yohanes Anberbir *The Reporter* (Amharic) <https://www.ethiopianreporter.com/article/14706>.

Ethiopia's political crisis.¹⁴⁹ As per the federal constitution Article 48, disputes and misunderstandings between two or more regional states are expected to be resolved amicably by the regional states. If that fails the matter has to be submitted to the House of Federation (HoF)- a non-legislative second chamber composed of representatives of the different ethno national groups. Yet despite such clear constitutional principle, the federal government issued a proclamation establishing the Identity and Administrative Boundary Commission that is accountable to the Prime Minister. The commission is required to bring studies for addressing identity based and boundary disputes to the federal executive, parliament and the HoF. As per the constitution identity based demands are decided by the local and regional state elected councils once the demand is submitted by the concerned community. The new body takes away the mandate of the community and the regional state councils and ultimately the *substantive* mandate of the HoF. What has been bestowed by the *constitution* to the regional states and the HoF is now given to the commission by *law*. Self-government as stipulated in the constitution is mandate of the 'nations and nationalities' (Articles 8, and 39) and any controversy related to self-government is adjudicated by the HoF: the house that is supposed to guard their interests. As it takes away the mandate of the HoF and introduces a centralized decision making disregarding regional states, experts argue it is un constitutional body. Besides some of the members are well known political activists and leaders of political parties –partisan and not independent ones as claimed by the federal government and the law itself.¹⁵⁰ The nomenclature of the commission is also controversial. In Amharic the word '*Astedader Wosen*' is centrist in its connotation. Regional states in Ethiopia are autonomous units, not provincial boundaries as in a unitary state and it is indeed very odd to refer to *Astedader Wosen* as if the boundary of the states can easily be made and unmade by

¹⁴⁹ Throughout the public and private media in Ethiopia, the dominant narrative for the last one year and half has been 'the source of all evil in Ethiopia is ethnic federalism.' One of the main opinion makers on this- former Derg official wrote 'ethnic politics that has been institutionalized by the ruling party for the last 28 years was the single cause...' Dawit Woldegiorgis, 'Ethiopia: on the Brinks,' <https://borkena.com/2019/04/10/ethiopia-a-country-on-the-brinks-by-dawit-woldegiorgis/>, April 10, 2019. There is little grasp of the political reality on the ground and there is little debate on the causes of ethno national based mobilization and the deep cleavages.

¹⁵⁰ See Yohanes Anberbir The Reporter (Amharic) <https://www.ethiopianreporter.com/article/14706>.

the federal government. Any adjustment to boundary of regional states can only be made both by the participation of the federal government and regional states as it amount to constitutional change. The normative assumption of the law thus speaks for itself: very centrist and thus are rightly criticized as designed by ‘*Abadawi* mindset.’¹⁵¹

Arguably, the law could have established an independent body of experts, not political activists, under the HoF that could provide expert opinions on the same matter to the HoF, helping it make sound decisions. Abiy’s speech in July 2021 that stated the contested territories (in western Tigray) as belonging to *Begemidir* (old name of Gondar of the Amhara region) also prejudices an outcome that may be made by the commission. The outcome of the commission is now a forgone conclusion.¹⁵²

While the HoF initially attempted to broaden the mandate of the states, it substantially shifted in its later decisions by extensively broadening the mandate of the federal government to include the power of administering and implementing its own law or even make and unmake regional state boundaries through centrally appointed bodies. The latest laws extend the mandate of the federal government to include even mandates of urban local governments. Contrary to the intention of the framers, the federal government induced regional states to delegate the power to administer land in their respective territories to the federal government in 2010/2011.¹⁵³ This development should be seen in light of the recent broader political context in the country. As noted already, the states in Ethiopia, unlike many federations, have no role in influencing policy making at the center because the HoF has no law making functions. The only guaranty for the nationalities appears to be the vigilant exercise of their powers as ultimate interpreters of the constitution. Yet the political practice of centralization and the CCI/HoF’s latest decisions indicate

¹⁵¹ The application from Tigray regional state to the CCI as summarized in the decision of the CCI of Hamle 24/2011 E.C captures this point very well.

¹⁵² Not surprisingly an application made by Tigray regional state to quash the law establishing the commission as unconstitutional was not accepted by the CCI. The CCI on Hamle 24/2011 E.C ruled that the contested law is constitutional and rejected the application.

¹⁵³ According to Article 52/2d regional states are mandated to ‘administer land and other natural resources in accordance with federal laws.’ Based on this clause regional states have been providing land for lease to investors in their jurisdiction until the new centralizing drive.

the HoF has fallen into the influence of the party that wields power at the center and became an instrument of centralization.

6.5.2.1 *Self-Rule v. Rights of Citizenship*

Another and more controversial case relates to the Benishangul-Gumuz case, one of the nine regional states in which tension emerged in the state between the indigenous groups (Berta, Gumuz, Shinasha, Komo and Mao) with a mandate to self-rule and the highlanders (Amhara, Oromo and Tigray nationalities often called ‘non indigenous’) who wanted to run as candidates but did not know any one of the local vernacular languages. The latter group were prohibited from running as candidates for the 2000 election for the regional and federal parliament. The highlanders most of them forcefully transferred to the regional state during the military junta’s resettlement program (constituting some forty seven per cent of the population in the region), complained to the HoF against the decision of the Electoral Board, a body that barred them. The applicants argued that the decision of the Board violated their constitutional right to be elected granted to every citizen without any discrimination and asked the HoF to quash it as it contravenes the equality and supremacy clauses of the federal constitution (Article 9).

The CCI, a legal advisory body to the HoF gave a divided opinion constituting the majority and a minority on July 6, 2000 admitting that the application raises constitutional interpretation questions. The issues formulated were: as to whether the law¹⁵⁴ which sets the conditions for candidature, one of which is knowledge of the vernacular of the state violates the right of citizenship, equality and self-rule stipulated in the constitution or not? And as to whether the decision of the Electoral Board based on such law is constitutional or not.¹⁵⁵

¹⁵⁴ The law in question is the Proclamation to make the Electoral Law of Ethiopia conform with the Constitution of the Federal Democratic Republic of Ethiopia Proc. No. 111/1995, *Negarit Gazeta* TGE, 54th year, No. 9 Addis Ababa, 23 February 1995.

¹⁵⁵ See the opinion of the CCI (unpublished).

The majority of the CCI emphasizing on ‘clause bound’¹⁵⁶ interpretation and on the constitutional rights to equality, non-discrimination and citizenship rights concluded the decision of the Board violated the constitution. The minority based on ‘purposive interpretation’ that focuses on adhering to fundamental normative assumptions of the text, that is, on the right to self-rule of ethno nationalist groups, endorsed the decision of the Board, banning the highlanders from running as candidates.¹⁵⁷

The HoF considered both opinions but rendered a different decision which was more in line with the opinion of the minority.¹⁵⁸ It emphasized that no doubt if the candidate is to speak for the people he/she claims to represent in parliament or to introduce his/her aims and programs to the electorate, he/she is required to know the working language of the regional state which is Amharic. By virtue of the proclamation, the candidate is required to know the working language of the *regional state* and to that extent the proclamation does not contradict the principles of the Constitution. On the other hand, the HoF found the Board’s interpretation of the proclamation to mean a candidate should be versed in any of the indigenous languages, unconstitutional and declared it null with prospective effect and allowed the highlanders to participate as candidates in future elections. The decision was largely received with a wide support as it tried to balance conflicting interests between the right to self-rule and right of citizenship. Yet one could pose an issue: what would the decision of the HoF be if the regional state adopted one of the local languages as working language instead of Amharic? The case goes beyond the debate between group and individual rights. It raises the core issue of carefully balancing the right of citizenship that includes the right to participate in public affairs throughout the country which is the mandate of the federal government and the right to self-rule that remains within the mandate of the states. This fundamental issue remains un resolved. Given the context

¹⁵⁶ There are many normative orientations in constitutional interpretation. Clause bound is not often a preferred method as it focuses on a specific clause of the constitution without looking into the whole text. Purposive (also called teleological, functional) interpretation attempts to resolve constitutional issues by grasping the spirit of the constitution as a unit. See Barak (n 29).

¹⁵⁷ See Article 38(1) of the federal constitution and Article 38 of proclamation 111/1995 and Article 45 of proclamation 532/2007.

¹⁵⁸ See decision of the HoF of *Megabit* 5, 1995 E.C (12 March 2003).

that the Ethiopian federal system is strongly in favour of the right to self-rule of ethno national groups, it remains critical for the HoF to carefully strike some balance between the mandates of both levels of governments.

A related but less controversial case concerns the *Silte* decision¹⁵⁹ a case in which a certain community that were perceived to be part of the *Guraghe* ethnic group claimed a separate identity from the latter and set up a local government in the Southern state. The process involved, as required by the federal Constitution Articles 39 and 47, the local population, the regional state parliament (constituted of very diverse groups) and the HoF but the respective role of these actors was never clear. The matter was finally resolved in 2001 by a referendum organized by the HoF in which large majority of the *Silte's* chose to separate themselves from the *Guraghe* and form a local government within the constituent unit. The fact that the HoF is a political organ seems to have given it the legitimacy to provide a political solution to the case. Nevertheless many similar demands (Kimante of the Amhara region, Menja and Wollene of the South), for the establishment of local government remain contested and of late the HoF has remained reluctant to provide solution to such demands directly and focused instead on 'addressing issues of governance.' The new thinking is that demands by sub state minorities for recognition and self-rule emanate because of political and resource marginalization at the local level and addressing those issues might reduce the continued demand for recognition and self-rule. Indeed in the case of the Kimante, a minority within the Amhara regional state, a delayed and less accommodative response from the regional state and the failure on the part of the HoF to mediate the conflict without delay continue to cost lives since 2015.

6.5.3 *Rights Without a Guardian*

6.5.3.1 *Constitutional Basis*

Among the key challenges that ethno nationalist based federations of the Ethiopian type that focus on self-rule face is that the political elite in the states may be tempted to behave as local autocrat and discriminate between local majority and local minority which has serious impact on the rights of citizenship to actively participate in public affairs throughout the

¹⁵⁹ See the opinion of the CCI written on 25 January 2000 (unpublished).

country. This has impact on the long term stability of the federation. One way of addressing this challenge is to have strong institutions that enforce individual human rights nationwide.

The insistence on human right protection is not without reason. The Ethiopian constitution chapter two (Articles 8–12) provides for *fundamental principles* of the constitution. Article 10 in particular states, ‘Human rights and freedoms, *emanating from the nature of mankind*, are inviolable and inalienable’ implying that human rights are ‘parents and not children of the law.’¹⁶⁰ Adopting the natural law conception, human rights derive from the inherent dignity of human beings and remain the foundations of the system. They remain critical standards to evaluate the validity of laws, institutions and state objectives (Preamble second paragraph). Chapter three of the constitution in particular provides for the guarantee of host of individual and group rights and constitutes *one-third* of the Constitution. Reinforcing the fundamental nature of human rights as one of the principles of the constitution, Article 104 stipulates a rigid procedure for constitutional amendment requiring the approval of the nine regional states and the two houses at federal level.

When fundamental rights and freedoms are given special position in the constitution through incorporation and by providing rigid amendment procedure, it means that current majority in power cannot overstep such constitutional guarantees. Such rights are then called constitutionally entrenched: a form of higher law that set limits on powers of political institutions. As such acts of political institutions can only be legitimate so long as they comply with the human rights norms in the constitution.¹⁶¹ Constitutional entrenchment of human rights implies that the state is viewed as a threat to liberty particularly to civil and political rights.¹⁶² Constitutional interpretation and enforcement of human rights then is the application of these constitutional norms against the state and its agents such as the legislature and the executive.

The above scenario implies that if constitutionally entrenched rights and freedoms are to remain as limitations on power, a certain institution must be established and empowered to check whether the acts and

¹⁶⁰ See Amartya Sen, ‘Human Rights and Development,’ in Bard Andreassen and Stephen Marks eds., *Development as a Human Right: Legal, Political, and Economic Dimensions* (Harvard: Harvard University Press, 2006): 4.

¹⁶¹ Ronald Dworkin (n 13): 354.

¹⁶² Ginsburg (n 7): 21.

decisions of the political institutions comply with (either before they are enacted or after the fact) the constitutional norms. Recognition of human rights in the constitution is an important step forward but is not enough. Strong institutional protection and enforcement is a crucial *requirement* in giving life to constitutionally entrenched human rights. Besides such an institution needs to be impartial and independent if it is to set a limit on the power of the political institutions. As Barak argued, ‘the protection of human rights – the rights of every individual ... cannot be left only in the hands of political institutions which by their very nature reflect majority opinion.’¹⁶³ ‘...human rights (civil and political rights) must be insulated from the power of the majority.’¹⁶⁴ Yet this mandate is given to the HoF and as is illustrated in the cases below, it is hardly possible to envisage a political institution dominated by the same party to set limits on its power. One may argue that that the political systems such as the United Kingdom and Australia are doing well by respecting the rights and freedoms of their respective citizens,¹⁶⁵ without constitutional entrenchment and without constitutional courts enforcing human rights. In these political systems parliament continues to be the guardian of rights. This practice needs to be taken with a lot of precaution when it comes to the situation in Ethiopia. Parliamentary model of human right protection assumes a complex political arrangement. The composition of the legislature, that is, a parliament that fairly represents the existing political forces implies that those represented will seek for serious negotiations and compromises before adopting laws and policies. The law making process such as the various steps and the two houses involve a complicated process that provide opportunities for competing interests to influence the content of the law. Parliamentary committees play critical role in human rights protection by screening government draft laws and policies often through non-partisan committee (drawn from all parties). They conduct pre enactment scrutiny of legislation’s compliance with human rights standards and/or hold enquires and bring reform as alternative. In some parliaments electoral laws may provide for proportional representation and hence a parliament that is fairly representative of diverse interests and

¹⁶³ Barak (n 29): XI.

¹⁶⁴ Ibid.: 33.

¹⁶⁵ Waldron (n 13), for example argues that there is no reason to suppose that rights are better protected by the institution of judicial review than by democratic institutions.

opinions hold watchful eyes on government policies and serve as effective legal and political control.¹⁶⁶

The above institutional mechanisms are not only in their infant stage in Ethiopia but recent political history reinforces the risks of putting too much faith on political institutions. For a large part of the twentieth century, Ethiopia has suffered a lot in the hands of an absolute monarchy (1930–1974) and a military dictator (1974–1991). Despite the existence of written constitutions that provided for some rights, the rulers enjoyed unfettered power until they were removed from power. Ethiopia and Ethiopians suffered under personal rule. Political power remained unrestrained and not institutionalized. Public institutions merely served as instrument of power. The record therefore is that political institutions can hardly serve as limits to power or as guardians of rights.¹⁶⁷ Nor is the current parliament viewed as representative of diverse interests. As such there is no parliamentary practice of pre enactment scrutiny of draft government policy and law for their compatibility with human rights. Nor are there non-partisan committees with mandates for human rights. It is easily observable that in the Ethiopian context where the same party controls both the legislative and executive branches one cannot expect strong form of check and balance between the two branches. Owing to lack of relevant parliamentary practices, reliance on parliament for protection of rights has not brought satisfactory solution so far. One is thus forced to look at the CCI/HoF and the judiciary's role in the protection and enforcement of civil rights and political freedoms.

In relation to the judiciary, as a result of jurisdictional confusion between courts and HoF, many judges at various levels think that they have little or no role in the interpretation and enforcement of human rights. This is particularly acute when it comes to the enforcement of rights as limits to power and public institutions. Studies have indicated that 50% of 51 federal Supreme Court, 46% of 116 state high court and 48% of 174 lower court judges think that they have no power to interpret the constitution but can only enforce it. Thus there is a wide spread belief among the judges that places exclusive mandate on the HoF

¹⁶⁶ Tom Campbell, Jeffrey Goldsworthy, and Adrienne Stone, *Protecting Human Rights Without Bill of Rights* (Ashgate: Aldershot 2006): 51, 239.

¹⁶⁷ The only exception to this overall trend is the decision of the CCI/HoF on Melaku Fenta case made on January 2, 2014 that for the first time nullified two federal laws for violating the constitution.

and leaving the political institutions unchecked.¹⁶⁸ Latest cases illustrated below decided by the Cassation Bench of the Federal Supreme Court confirm the same conclusion.¹⁶⁹

The first case is the *Heirs of Wasihun v. Agency for Government Houses* (hereinafter the Agency). The Ethiopian Privatization agency (EPA) is empowered by virtue of Proclamations No. 110/95, 87/1994 and the amendment Proclamation No. 193/2000 to return houses and building illegally expropriated outside of the proclamations during the Military junta.¹⁷⁰ The Heirs submitted their claim on a building located in Addis Ababa to the EPA alleging that the building was expropriated outside the scope of Proclamation 47/67. The EPA sent the claim of the heirs to the Agency ordering it to submit its response on a specific date. After hearing both parties and the evidence, the EPA on January 23, 2000 decided that the building was expropriated outside of the decree and should be returned to the lawful heirs.

The Agency appealed to the Board, higher level government body within the executive. The Board without summoning and hearing the heirs reversed the decision of the EPA on November 28, 2009. The law that established the Board is silent as to what procedures the Board should follow in the process of making its decisions and what happens if the Board's decision violates due process of law. The Board reversed the decision of the EPA. The Heirs then appealed to the Cassation bench of the Supreme Court alleging that the Board has denied them due process and access to justice. The Cassation bench of the Federal Supreme Court however decided on April 29, 2009 (File Number 43511) stating that the

¹⁶⁸ A study that covered 341 judges from four regional states including the federal capital Addis Ababa in 2009 and later in 2013 were consistent in this regard. Ashebir Adisu, *The Role of the House of Federation in the Enforcement of Human Rights in Ethiopia* (LL.M Thesis, Ethiopian Civil Service University, 2013 Unpublished).

¹⁶⁹ On occasions the courts have invoked constitutional rights and interpreted them broadly, for example, in relation to child rights, yet such cases are exceptions than the rule. See for example *Tsedale Demise vs. Kifle Demise* Federal Supreme Court Cassation Division File No. 23632 (2006) v. 5 (Decisions of the Federal Supreme Court Cassation Division) v. 5 p. 188.

¹⁷⁰ Proclamation 47/67 was a law enacted by the military junta right after it came to power in 1974 to expropriate what was then called 'extra houses and land' owned by relatively richer people. The new government that came to power in 1991 attempted to rectify some of the abuses done in excess of the decree by returning some building to the owners.

Board is an administrative body and hence the Court has no mandate to review as to whether its decision contains fundamental error of law.

As the position of the Cassation bench illustrates, the Court has refrained from defining its own role and mandate. This is problematic because quasi-judicial bodies established within the executive have their own structural problems.¹⁷¹ Those appointed to serve in the tribunals are not necessarily trained in law. In many cases they are high level political figures and more importantly as in the heirs of *Wassihun v. the Agency* case illustrate the laws establishing the tribunals provide no clear procedure that must be followed in making their decisions. In the absence of legally prescribed procedures that ensure due process to parties, the Federal Cassation Division should have guaranteed final review to ensure due process and the right of access to justice. To be sure Ethiopia is a signatory to the ICCPR (Article 14) and UDHR (Article 10) both of which provide the right to fair and public hearing. Article 17 of the constitution ensures that no one shall be deprived of his liberty without due process of law. Article 78(4) of the federal constitution while acknowledging the existence of quasi-judicial bodies clearly stipulates that ‘special or ad hoc courts which take judicial powers away from the regular courts or institutions legally empowered to exercise judicial functions and which *do not allow legally prescribed procedures* shall not be established.’ This could have served as a basis to quash the decision of the administrative body to ensure due process to the parties. This outrageous decision was later reversed.¹⁷²

¹⁷¹ The executive as a key political institution is established for implementing laws and policies of the legislature hence the Amharic term (*Asfetsami, executing*) and is not meant to be an impartial dispute adjudicator.

¹⁷² Based on the instructions of the HoF, the Federal Supreme Court reversed its own decision after addressing the violation of due process to the heirs of Wassihun et al. See Heirs of Wassihun et al. vs. Agency for Government Houses, decision of the Cassation division of the Supreme Court file number 43511 v.14 P.211.

6.5.4 *Property Right and Due Process [File Number 79/12]*

Birhane Teiumelissan, Romanwork Nigatu vs. Privatization Agency, Construction and Business Bank, Ministry of Defense

The applicants owned a 2,000 square meter land in Addis Ababa which they leased to a private company during the imperial era. To construct a building on the land, they took a loan from the Construction and Business Bank, which held a mortgage on the title deed of the building. However, after the military regime assumed power in 1974, the expropriation of what it called “extra houses and urban land” under proclamation number 47/1974 began. The expropriated buildings and land were later administered by the Agency for Government Houses, which was later replaced by the Privatization Agency after a change of government in 1991. The Privatization Agency was tasked with investigating cases of abuse of power by government officers who expropriated land and buildings outside the requirements of proclamation 47/1974. If proven, the Agency could order the return of the buildings to the rightful owners.

In this case, the applicants sued the respondents before the Privatization Agency, presenting proof of their title deed. However, the Ministry of Defense, the institution now in possession of the building, presented a counter-evidence showing a title deed issued by the relevant Sub City Municipality. The Privatization Agency closed the file, stating the latter’s evidence is valid and title deed of the applicants regarding the building was lost when it was expropriated in 1974. The applicants submitted the same case to relevant courts, including the Federal Cassation Court, but their case was dismissed, stating that the Privatization Agency had already closed the file based on evidence and that its decision could not be reviewed.

The applicants brought their case before the CCI and argued that their right to property and access to justice, protected by the constitution, had been violated. The CCI examined the case and recommended that the courts had not done proper hearing and should have examined whether the applicants’ case was expropriated within the limits of the law and whether the right to own property had been violated. It also proposed that the right to access to justice had not been respected by the courts.

However, the HoF dismissed the CCI’s opinion, stating that the Privatization Agency and the courts had done their job within the mandates as defined in the different laws. This decision raised two issues. Firstly, the

Privatization Agency is an administrative body empowered to hear cases, but its establishment law does not require it to ensure due process and fair hearing. The evidence from the records of the case showed in fact the Agency had decided without following due process of law. Lack of due process and fair hearing is a risk associated with quasi-judicial bodies as part of the executive, where the principles of impartial justice and due process are often violated.

Secondly, the right of access to justice as enshrined under Article 37 of the constitution demands that citizens have the right to a fair and transparent hearing, and the decision of the Privatization Agency did not ensure this. This lack of proper hearing and decision-making is likely to have affected the applicants' right to property. It is also unclear whether the building was expropriated following the procedures set in proclamation 47/1974. Moreover, whether the right to property, as enshrined in the 1995 constitution, should be violated by an archaic law issued in 1974, whose constitutionality remains suspect, should have been investigated by the HoF.

A related case is *Osman Seyed vs. Ethiopian Revenue Authority* [2022, file no 91/13].

The applicant, former employee of the Ethiopian Revenue and Customs Authority (ERCA), was charged with corruption for allegedly failing to discharge his responsibilities dutifully. A businessman imported goods from abroad and was supposed to pay ETB 346,127.42 of customs duty due to ERCA but did not pay either because of corruption or irresponsible discharge of duties by the applicant. The lower courts in the Amhara region set the applicant free, stating that this was administrative malpractice, not a crime.

ERCA brought the case to the Cassation bench of the Federal Supreme Court, and the Court decided that the applicant was guilty under the anti-corruption law. The applicant applied to the CCI, and the latter, after reviewing the relevant laws and evidence found out that the applicant was charged based on the Revenue and Customs Proclamation which does not make minor maladministration errors a crime. Yet, the Cassation bench cited a new anti-corruption law issued while the case was pending before the court that made such administrative malpractices an act of corruption and found him guilty. The applicant brought the case to the CCI, and the latter criticized the decision of the Cassation court on two grounds. First, the applicant was charged in the lower courts based on the ERCA proclamation and this law does not make it an offense. The anti-corruption

law was issued while the case was pending before the court and thus the law cannot apply retroactively and make the applicant a criminal, as he was not at the time. Secondly, the applicant was not charged under the new anti-corruption law, and his right to be presumed innocent and all other basic rights of suspects related to due process under the constitution (Articles 21–22), were violated, according to the CCI. Therefore, the decision of the Cassation Court was unconstitutional, and the CCI recommended that the HoF quash the decision and release the applicant. The HoF endorsed the CCI's opinion and ordered the court to release the applicant.

6.5.5 *The Position of the CCI/HoF and Its Implications*

Citizen's whose rights have been violated have access to the CCI as a last resort yet the position of the CCI also proves it has failed to enforce such rights and political institutions have little restriction on their powers. There are three cases that indicate the failures on the part of the CCI in setting a limit to the political institutions.¹⁷³ One is the case between the *Heirs of Wassihun v. Agency for government Houses* discussed above. The heirs applied to the CCI after exhausting remedies within the judiciary and the CCI rejected it simply stating that case does not give rise to constitutional interpretation thus endorsing the position of the Cassation Court, leaving no recourse to the applicants. The HoF however considered the case when referred to it by the heirs for interpretation and remanded it to the Supreme Court to address the violation of due process right.¹⁷⁴

The other case relates to the case between *Asehanfi Amare and et al. v. Ethiopian Revenue and Customs Authority* (herein after referred

¹⁷³ In a few cases related to rights of women and children, rights that are politically less delicate the HoF/CCI have enforced such rights reversing decisions of regular courts. In the Kedija Beshier and Ethiopian Women Lawyers Association case, the HoF decided a woman should not be subject to jurisdiction of Sharia Court without her consent, reversing the decision of the Federal Supreme Court. 2nd House of the Federation of Federal Democratic Republic of Ethiopia, 4th Year, 2nd Regular Meeting, 57 *Ginbot* 7, 1996 Ethiopian Calendar (May 2004).

¹⁷⁴ Based on the instructions of the HoF, the Federal Supreme Court reversed its own decision after addressing the violation of due process to the heirs of Wassihun et al. See *Heirs of Wassihun et al. vs. Agency for Government Houses*, decision of the Cassation division of the Supreme Court file number 43511 v.14 P.211.

as Authority). Proclamation No. 587/2008 that deals with the establishment of the Authority mandates the Council of Ministers to issue regulation concerning the employees of the authority. Article 19 sub 1 (b) of the proclamation states ‘the administration of the employees of the Authority shall be governed by regulation to be issued by the Council of Ministers.’ This proclamation is meant to serve as parent (enabling) law to the regulation to be issued by the Council of Ministers. The latter issued Regulation No. 155/2008 and Article 37 of Regulation No. 155/2008 states:

- ‘1. Notwithstanding any provision to the contrary, the Director General may, *without adhering to the formal disciplinary procedures*, dismiss any employee from duty whenever he has *suspected* him of involving in corruption and lost confidence in him.
2. An Employee who has been dismissed from duty in accordance with sub article 1 of this Article may not have the right to reinstatement by the decision of any *judicial body*.’

By virtue of this regulation, the Director General is mandated with contested powers. The Director General is not required to prove that the employee is corrupt. A mere suspicion is enough to dismiss an employee. The Director General is also a judge on its own case. The Director General can dismiss the employee without any impartial investigation or without adhering to the formal disciplinary procedures provided in laws governing civil servants.¹⁷⁵ More importantly, the parliament set no guiding principles against which the decisions of the Director General are to be checked through the institution of political control. It issued something comparable to a blank check, where the executive is free to fill whatever it wants.

Accordingly, the Director General dismissed Asehanfi Amare and et al. and the employees sued him for not ensuring due process of law and for denying them access to justice as is provided under Article 37 of the Constitution. The decision of the Director General, according to the regulation is non-reviewable by an impartial court which affects the right of access to justice.

The Court, without considering the merit of the cases, referred the matter to the CCI/HoF alleging that the decision of the Authority seems

¹⁷⁵ See Proclamation No 515/2007, Federal Civil Servants Proclamation Articles 69.

to have problems with Article 37(1) of the constitution that ensure access to justice. The apparent reason stated is that the regulation prohibits any court from reinstating such dismissed employees while it could have resolved the issue without referring the case to the CCI/HoF. The court could have disposed the case on another legal basis, that is, 'on non-constitutional grounds.' If a court can decide a case and see that justice is done to the parties and at the same time avoid the issue of constitutional interpretation, the court must give precedence to that.¹⁷⁶ The leading US case that set this principle is the *Ashwander v. Tennessee Valley Authority*¹⁷⁷ where the court stated 'it is not the habit of the court to decide questions of constitutional nature unless absolutely necessary to the decision of the case.' The court should not engage on the constitutional question although properly presented, if there is some other ground upon which the case may be disposed of. Constitutional issue should not be needlessly confronted. The same principle is widely used in countries with constitutional courts.¹⁷⁸ Based on the above assertions, the court could certainly nullify the regulation for being too broad an authorization that goes contrary to the parent law and for violating due process right or fair and public hearing.

The case could have also been disposed by analysing the relationships between the parent law, the Federal Civil Servants Proclamation number 587/2008 and the regulation as it is the duty of the judge to decide the case based on the proclamation and set aside the regulation. That is a simple logic that comes with the idea of hierarchy of laws.

But as the Court failed to provide remedy to the victims, the case was finally referred to the CCI/HoF and the latter ruled that in a parliamentary system of government, the legislature has the discretion to define which cases need to come before courts or not and the regulation (apparently it was the executive, not the legislature that issued the regulation and hence the CCI/HoF confuses both organs) falls into this discretion

¹⁷⁶ This principle is also called constitutional avoidance. See Carr (1970): 187.

¹⁷⁷ *Ashwander v. Tennessee Valley Authority* 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) see also *Rescue Army v. Municipal Court of Los Angeles* 331 Us 549, 569 (1947); *Siler v. Louseville and Rashville* R. R. Co. 213 US 175, 191, 1901; *Department of Commerce v. House of Representatives* 525, US, 316, 344 1999; *Clinton v. Jones*, 520 U.S. 681, 690, n.11 (1997).

¹⁷⁸ See Kommers and Miller (n 92): 13 and 34.

and does not violate access to justice. The CCI/HoF as well as the Cassation Court's position proves that the rule of law is articulated merely as an instrument of power as both institutions declined to review the decisions of the Director General. The third case is related to an extension of the mandate of the federal government beyond constitutional limits elaborated below.

6.5.6 *Constitutional Adjudication and Democratic Order*

The newly appointed National Election Board of Ethiopia (NEBE) announced on 31 March 2020 indicating that it cannot hold election initially scheduled for 29 August 2020 as per the schedule stating COVID-19 pandemic does not allow conducting major activities related to election. The announcement triggered country wide debate as to how to address two major issues: manage the health crisis and how to address election related deadlock. The ruling party issued an emergency decree that was followed by detail regulation to address the pandemic although its implementation remained loose. On postponing of the election, it remains a major issue as the mandate of the federal government and the nine regional states would come to an end on the first week of October 2020.

The House of Peoples Representatives requested a constitutional advice from the HoF which referred the matter to the CCI. One can safely assume that the government selected this route considering the fact that it had sufficient vote to secure the kind of constitutional opinion it desires since the ruling party fully controls the HoF. The CCI, after holding a public hearing from which those who were suspected of having opinions that the government might not like were excluded, decided that the elections could be postponed until Parliament decided that COVID-19 was no longer a public health threat. It also extended the term of Parliament and regional state councils until the sixth general elections were held. This decision was endorsed by the HoF.

There is no agreement among scholars on whether the constitution could be interpreted to allow the postponement of the elections and the extension of the term of parliament given that there is an express clause in the constitution that sets five year term. There is however a general agreement that the process and the decision of the CCI/HoF was deeply flawed. The public hearing was less than inclusive of diverse views on

the matter.¹⁷⁹ First, the CCI did not recommend putting a limit on the powers that the government can exercise during the extended period. As per the recommendations of the CCI and the decision of the HoF, the government is allowed to act as if it is within its term limit. Secondly, the CCI recommended that the government to be in charge of deciding if and when the sixth national elections would be held. Third the CCI did not require inclusivity in the government. The government is not enjoined to consult regional states and political parties on public matters during the extended period including how and when the elections would be held. Four, the CCI recommended that the term of state councils would also be extended without so much as providing detailed justification for doing so. States are autonomous levels of government and they have at least some say on certain issues regarding elections for state councils including determining the term of state councils through their constitution. In its one page decision on the extension of the term of state councils, the CCI simply ignored this and suggested that the term of state councils should be extended. There was no request to extend terms of regional states and the CCI/HoF's decision in this regard was uncalled for. More interestingly, the CCI/HoF decision extends the HoF's term itself bringing a clear case of conflict of interest and the HoF becoming a judge on its own case. The HoF simply endorsed the federal government's request for extension of its term. A political body controlled by the same party served as rubber stamp institution.

The other issue relates to the TPLF. As part of its political tit-for-tat with the federal government and the Prosperity Party, TPLF insisted on elections being held before the expiry of the terms of Parliament. It maintained that postponing the elections was unconstitutional and would lead to power vacuum since, according to the TPLF, the mandate of the current parliament would come to an end on 10 October 2020 and under

¹⁷⁹ Several expert and written opinions that were submitted to the CCI were not heard. Addis Standard published some of these opinions in May 2020. Henok Gabisa and others wrote The Constitution should be Interpreted, if at all, to Reconstitute, Co-govern and Co-conduct a Post-Covid 19 National Election e *addisstandard*/May 18, 2020. <https://addisstandard.com/commentary-the-constitution-should-be-interpreted-if-at-all-to-re-constitute-co-govern-co-conduct-a-post-covid-19-national-election-iola/>. Andreas Eshete was the only senior expert who openly questioned the move saying given the pandemic indeed we need to hold elections on time to closely scrutinize government actions in this difficult time. See brief summary of his view. <https://www.fanabc.com/english/hearings-on-constitutional-matters-continues-discussing-several-issues/>.

no circumstance can that be extended. Importantly, it resolved to hold a state wide elections in Tigray should the national elections be postponed beyond the set date a resolution that the TPLF implemented in September 2020. It claimed, holding regional state election is part and parcel of the mandate to self-government. The Tigray Democratic Party challenged the constitutionality of the measures taken by the TPLF in terms of establishing electoral board and holding elections. The CCI decided that the action of the Tigray state government in this respect was unconstitutional.¹⁸⁰ Tigray by then did not have representatives in the HoF and its claim that holding regional state elections at a time when the National Election Board declined to conduct the elections was fully justified as part and parcel of the right to self-government was not given due consideration. This was one among the many causes of the tragic civil war between the federal government and the regional state that broke out early November 2020.

6.5.6.1 *Conflict of Interest*

It is possible to trace conflict of interest between the chief legal advisor of the Authority (the defendant that summarily dismissed employees based on mere suspicion of corruption without following due process) and the CCI. The chief legal advisor is a member of the CCI. It is possible to assume that the Director General would consult his chief legal advisor before taking such measures on its employees. The presence of the chief legal advisor in the CCI while handling the case raises issues of impartiality and conflict of interest. Perhaps this explains why the opinion of the CCI as discussed above is full of contradictions and lacks normative orientations while adjudicating the case.¹⁸¹ Conflict of interest was also clearly involved in the case of Coalition for Unity and Democracy (*CUD*) *v.* *PM Meles Zenawi*,¹⁸² a case brought before the CCI requesting the latter to declare unconstitutional a directive issued by the PM following the

¹⁸⁰ የትግራይ ዴሞክራሲያዊ ፓርቲ እና የትግራይ ክልላዊ መንግስት የኢ.ፌ.ዴ.ሪ ፌዴሬሽን ምክር ቤት 5ኛ የፓርላማ ዘመን፣ 5ኛ አመት እንደጀመረበት በብሰባ (ነሐሴ 30/2012) (Tigray Democratic Party vs Tigray Regional State FDRE House of Federation 5th Year of Parliament, 5th extra-ordinary meeting August 2020.

¹⁸¹ It is also possible that the Chief Justice and his deputy will review a case submitted to the CCI which they already made as judges of the Federal Supreme Court. Thus the issue of conflict of interest also applies to both judges. Ironically both judges serve as chair and deputy chair of the CCI.

¹⁸² *CUD v. PM Meles Zenawi*, Decision of the CCI rendered on 14 June 2005.

May 2005 election crisis and its aftermath banning demonstrations in the capital for a month. The PM took such a measure alleging that there was a security threat that necessitated the ban. The case was brought before the CCI and considered as constitutional although the CUD insisted that the ban should be declared unconstitutional. In this case as well one of the members of the CCI is also legal advisor of the PM on a status of a minister. It is very likely that the PM consulted his legal advisor before he took such a measure. When such a decision is challenged for its constitutionality and when such challenge comes from a political opposition an impartial adjudicator becomes critical. It is vital to note that while revising the law¹⁸³ that defines the powers of the CCI, an express clause requiring members of the CCI to step down from deciding a case, if they face with ‘conflict of direct or indirect interest’ (draft Article 10) was dropped from the final version.

The above scenario demonstrates that the CCI/HoF as a political organ dominated by the ruling party has aligned itself with the majoritarian view and failed to resolve disputes impartially and failed to set limits on power reducing the rule of law merely serving as instrument of power. Constitutional design that provides majoritarian body to be a judge on its own case is partly the explanation for this state of situation. It is also partly the result of one party controlling all political institutions including the HoF. The current constitutional design has largely failed to ensure effective protection to civil and political rights. The other explanation relates to the prevalent confusion in the role of the courts and the CCI/HoF in relation to fundamental rights and freedoms and the courts own timidity. A federation that was conceived to be a compact among nations and nationalities and a response to age old ‘question of nationalities’ that ensures genuine self-government to territorially based cleavages ended up becoming a centralized federal system. The HoF and CCI were supposed to keep the federation on balance but have rather reinforced the centralization and their role remained marginal, if not irrelevant.

¹⁸³ CCI proclamation to Re-Enact for the Strengthening and Specifying the Powers and Duties of the CCI of the Federal Democratic Republic of Ethiopia, Proclamation Number 798/2013, *Federal Negarit Gazeta* 19th Year No. 65 Addis Ababa 30th August 2013.

6.5.7 *Land and Right to Property*

Major exceptions to the general trend within the HoF/CCI demonstrated above relate to land and property related rights, and women where the CCI/HoF have shown some semblance of impartiality.

Borchu Genore vs. Bitsuan Amare [2022, File Number 101/13]

The applicant in this case had his land and property in the SNNPR expropriated by local authorities in the name of promoting investment. The applicant sued both the respondent and the local government in a local court for adequate compensation and substitute land, but the court dismissed his case, alleging that expropriation is done for public interest and promoting investment. He appealed all the way to the Federal Supreme Court Cassation bench but found no remedy. He finally submitted to the CCI seeking constitution interpretation, citing his right to property under the federal constitution has been violated and mentioning that regular courts have not given him any remedy.

The CCI investigated the case and found that the applicant had indeed been evicted and lost his property. The regular courts failed to examine the applicant's case judiciously, violating his right to access to justice as enshrined in Article 37(1) of the constitution. The CCI further noted that by virtue of Article 48 of the constitution, property holders have the right to adequate compensation if their property is expropriated for public purposes. The applicant was not compensated despite making such demands in the different court hierarchies. The HoF approved the CCI's recommendations and subsequently quashed the decision of the Supreme Court Cassation bench as unconstitutional, ordering the Court to take appropriate remedies.

Individual peasants have filed complaints to the HoF, having exhausted remedies from courts that have legalized such disguised lease contracts that in effect sale land. The HoF has as a result declared many of such transactions null and void, and restored the farmers' right to possession of land. In the 2014/5 year the HoF has addressed a list of individual complaints related to rural land rights. As per the Ethiopian constitution Article 40(3) land is publicly owned. Yet farmers have the right to obtain land without payment for their livelihood. The constitution also allows them to lease their plot of land under their possession. In rural areas, however, there is wide spread practice of sale of land under the guise

of lease contract which in effect evicts the peasants from their possession. Of late there is a growing awareness on the part of peasants to reclaim their possession of land alleging that the lease contract was a disguised sale of land which violates the constitution Article 40(3). Based on the complaints instituted by individual peasants, having exhausted remedies from courts (that have legalized such disguised lease contracts that in effect sale land), the HoF has as a result declared many of such transactions as unconstitutional that violate Article 40(3), declared the transactions as null and void and restored the farmers' right to possession of land.¹⁸⁴

The HoF has been a weak institution in terms of guarding constitutionalism in Ethiopia. Most of the cases related to separation of power and federalism shown above reflect this observation. It has also made inconsistent decisions on the similar cases. Based on political consideration, it also made decisions that were clearly unconstitutional. A case in point is the *Asehanfi Amare and et al.* case. Its decision in relation to the postponement of the sixth general elections is also problematic and has been a source of political unrest and instability in the country. Overall, Ethiopia's experience with constitutional adjudication through a political institution predictably shows the HoF's reluctance to mediate constitutional disputes impartially. It has resulted in a centralized federation that lacks judicial review and human rights without a guardian leaving the system open for political manipulation by a dominant and centralizing party. It is a text book example of what Landau and Dixon called 'abusive constitutional review'¹⁸⁵ where by the interpreter serves as instrument of power, not as guardian of the constitution. In the abusive constitutional review framework, the interpreter serves either as rubber stamp to the political office holders or even goes further and attempts to legitimize the regime's unconstitutional actions. The most common manifestations

¹⁸⁴ See for example Mamite Seble vs. Mulu Gurmu decision of the HoF, Sene 18, 2007 E.C (June 25, 2015) Kelebe Tesfa vs. Ayelegn Derbew, decision of the HoF Sene 18, 2007 E.C (June 25, 2015); Halima Mohamed vs. Adem Abdi, decision of the HoF, Sene 18, 2007 E.C (June 25, 2015); Wedere Tachbele vs. Like Gurmu, decision of the HoF, Sene 18, 2007 E.C (June 25, 2015). All cases unpublished and on file with the author.

¹⁸⁵ See David Landau and Rosalind Dixon, 'Abusive Judicial Review: Courts Against Democracy,' *University of California, Davis* 53:3 (2020). Given that in Ethiopia it is the HoF, not courts that interpret the constitution, the author has adapted Landau and Dixon's abusive judicial review to abusive constitutional review.

include allowing the incumbent to extend its term beyond constitutional limits, legalizing unconstitutional emergency decrees and political parties branded as ‘terrorists,’ failing to nullify administrative and executive acts that target civilians and opposition political parties in violation of the due process clause. All these actions or in actions are common features of the Ethiopian constitutional adjudication system and the concept of abusive constitutional review aptly captures it. Rights and claims over land in rural areas, rights of women, rights of the child are cases where the HoF has shown some level of impartiality.

6.6 IS THERE A WAY OUT?

6.6.1 *Option One: Implicit Mandate of the Courts*

As the above empirical evidence proves, the judiciary thinks it has little or no role with respect to human rights section of the constitution. The CCI/HoF has also been reluctant to set limits on the power of political institutions. Given this reality what can one think of as an alternative? The corner stone provision in this regard is Article 13 of the constitution which has so far attracted little attention both from practitioners and the academia. Sub article one stipulates ‘All Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and *enforce* the provisions of this chapter.’ To be sure the provision imposes obligations on all public institutions but owing to the nature of the judicial function, the Article provides what one may call the *implicit* mandate of the courts at federal and state level to enforce and hence interpret chapter three of the constitution. One cannot argue the same with respect to the mandate of the judiciary in relation to other chapters other than chapter three as the judiciary has expressly been denied with such mandate. The argument is limited to the chapter on fundamental rights and freedoms. First a bit of background: the United States Supreme Court despite the bill of rights in the constitution argued for long, the bill of rights did not apply to states.¹⁸⁶ It changed its position only after the First World War and visibly during the Warren Court in the 1960s where it vigorously enforced bill of rights setting nationwide standards

¹⁸⁶ *Barron v. Baltimore*, 7 Pet. 243 (1833).

including in the states.¹⁸⁷ Article 13 is inserted in the Ethiopian Constitution to ensure that federal and state organs remain bound by the human rights chapter. This approach does not necessarily contradict with the mandate of the HoF/CCI. The argument is that final and authoritative interpretation of the constitution (including chapter three) is the mandate of the HoF/CCI. Yet as the weak form of review illustrated later show, courts can also interpret the chapter on fundamental rights and freedoms in the process of enforcing it, short of rendering a final verdict. Whatever interpretations the courts adopt is not necessarily final one. Whoever is not happy with the position of the court while interpreting chapter three can apply to the HoF/CCI for final resolution. A few authors have already made their position clear stating that enforcing the constitution (at least chapter three) does not include interpretation.¹⁸⁸ This position is however an understatement at best and a misunderstanding of Article 13 at worst with respect to the nature of the constitution and on the nature of human rights.

The judiciary's role/duty in 'respecting and enforcing' the rights and freedoms enshrined in the constitution cannot be meaningful unless it is involved in interpreting the scope and limitation of those rights. It must be noted that this is not only a mandate of the courts but is also a *duty* imposed on them. Whether we talk of the violation of the right to privacy or the scope and limits of freedom of religion, the court cannot arrive at a conclusion without defining the scope of the right in a particular case. The court before whose bench the case is brought is going to engage in determining the scope of that particular right and whether that particular right is violated or not, before it concludes whether the police officer or the executive's action has violated a specific right and if so whether government's act falls within the limits or not. It will be naïve to think that one can simply apply the provisions on human rights¹⁸⁹ without interpreting them as the reference is to constitutional provisions that often are brief, ambiguous, silent on a number of occasions or have to be adapted to changing realities.¹⁹⁰ As such, the words do not speak for themselves but

¹⁸⁷ *Gitlow v. New York*, 268, US 652 (1925).

¹⁸⁸ See Yonatan Tesfaye, "Whose Power Is It Anyway: The Courts and Constitutional Interpretation in Ethiopia," *Journal of Ethiopian Law* 22:1 (2008): 128–144.

¹⁸⁹ *Ibid.*

¹⁹⁰ Chief Justice John Marshall stated "Let's not forget that it is the constitution that we are expounding..." in *McCulloch vs. Maryland* 17 U.S. (4 Wheat.) 316, 407 (1819).

require contextual injection of meaning if they are to be intelligible.¹⁹¹ The constitution is often phrased generally as it is the fundamental document that only states the principles to be applied for generations. As such interpretation precedes implementation/application. This does not imply that the courts will have the last say. Whoever is not happy with the decision of the court can resort to the CCI/HoF as a last resort. Judges have found several excuses for not actively enforcing rights provided in the constitution and it is hoped that an express clause empowering them will minimize their fears as to whether they have any role in this regard. Regular courts are precluded from enforcing the supremacy clause of the constitution. Jurisdictional confusion between the courts and the HoF with respect to human rights has further contributed to the marginal role of the courts. Thus modest reforms that expressly empower the courts to enforce human rights could potentially enhance their autonomy with respect to civil and political rights. Besides the existence of two or more institutions providing multiple access points to right holders would provide better protection to civil and political rights.

Relevant experience in this regard is the concept of dialogue¹⁹² between the judiciary and the legislature when it comes to enforcement and protection of constitutionally protected rights and freedoms with the legislature retaining the last word under Sect. 33 of the Charter of Rights and Freedoms in Canada. Indeed this approach of enforcing rights and freedoms seems to be evolving as an alternative to the US style of judicial supremacy often accused of judicial imperialism and/or activism.¹⁹³ The weak form of review on the contrary shifts some power to courts while retaining ultimate legislative supremacy.¹⁹⁴ The judiciary is mandated to interpret and enforce human rights but does not retain the last word in interpreting and applying the higher law (Charter). It shares the jurisdiction to varying degrees and through different methods

¹⁹¹ Griffin (n 53): 13.

¹⁹² It is also called the 'weak form of judicial review.' See Peter Hogg and Allison Bushell, 'The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights is not as Such A Bad Thing After All,' *Osgoode Hall Law Journal* 35:1 (1997): 76–107.

¹⁹³ Wolfe (n 13).

¹⁹⁴ Campbell, Goldsworthy and Stone (n 166): 4.

with the legislature.¹⁹⁵ The essence of the dialogue between the judiciary and legislature is the ability of the latter to *reverse, modify (minor or major adjustments), affirm or avoid* the court's decisions by limiting or overriding it through the normal law making process.¹⁹⁶ The judiciary may also amend the law rectifying some of its defects. The court may also suspend the law where the legislature is given time to rectify within a span of time. If the legislature keeps silent the invalidity made by the Supreme Court takes effect after the lapse of time. The legislature at times may not take action implying that it complies with the court's ruling. This practice serves as catalyst for a two way exchange between the legislature and the judiciary on the topic of human rights and freedoms. The court's decision often induces the legislature to revisit the matter in calmer times.¹⁹⁷

The relevance of the concept of dialogue is that according to the implicit power implied in Article 13 the courts assert a mandate to interpret the human rights clauses yet the courts' ruling is not final with respect to chapter three. The above interpretation of Article 13 should not in any way be understood as proposition for or the advocacy of judicial activism. To state the point once more, the court is engaged in interpreting chapter three does not mean that the last words remains with the courts. The HoF/CCI retains the authoritative mandate for the final resolution of the constitutional dispute. It is merely a confirmation of the *implicit* mandate of the courts with respect to fundamental rights and freedoms. The argument for shared responsibility of courts and the CCI/HoF for the enforcement and interpretation of fundamental rights and freedoms, the latter retaining the last word is implicit in Article 13.

6.6.2 *Introducing Constitutional Court?*

A more sound option is to establish a constitutional court through constitutional amendment. We have seen already the regular judiciary in Ethiopia is a victim of both constitutional design and its own timidity.

¹⁹⁵ The legislative body is mandated under Sect. 33 of the 1982 Bill of Rights (otherwise known as the Notwithstanding clause) to override judicial nullification, which is rarely used. Gerhard Vander Schyff, *Judicial Review of Legislation: A Comparative Study of the UK, the Netherlands and South Africa* (Dordrecht: Springer, 2010): 182.

¹⁹⁶ Christopher Manfredi and James Kelly, Manfredi, 'Six Degrees of Dialogue: A Response to Hogg and Bushell,' *Osgoode Hall Law Journal* 37: 3 (1999): 513–525.

¹⁹⁷ Campbell, Goldsworthy and Stone (n 166): 241.

There is little faith in empowering the federal Supreme Court with the lofty task of constitutional interpretation and ensuring the supremacy of the constitution. An independent and distinct constitutional court along the German experience with an exclusive mandate over constitutional issues composed of experienced constitutional lawyers from different regional states can ensure impartial and peaceful resolution of disputes. The insurance model argued by Ginsburg where political parties need an institutional safeguard in time of democratic political loss is very powerful point and relevant to the Ethiopian political context. Supreme constitution backed by a constitutional court can ensure a rule of law and a political system bound by the constitution. It can set a limit on power—a major concern in many developing countries. The issue of bulk of rights without institutional enforcement discussed in this article can only be addressed through an independent and impartial constitutional court. Human rights without institutional enforcement mechanism remain dead letters and constitutional court can give life to the constitution and serve as a guardian of rights. In short, establishing a constitutional court can address a major institutional gap in Ethiopia in setting up a political system that enforces human rights and subjects itself to the constitution and the rule of law.

6.7 CONCLUSION

The discussions in this chapter indicate that constitutional interpretation is key to constitutional governance. Ethiopia chose a political organ, the HoF as advised by the CCI. The Ethiopian experience shows, it is a federation without judicial review and generous human rights both of individual and groups without a guardian. Ethiopia's age old problem of regulating power and subjecting it to rule of law also remains unaddressed. A leading expert in constitutional law Mark Tushnet (2014) states that 'courts in nations where a single political party dominates the system for an extended period rarely find national legislation unconstitutional.'¹⁹⁸ One may add, even naïve is to expect the HoF, a political organ controlled by the same party at federal and state level to serve as guardian of the constitution, enforce human rights and impartially demarcate the mandates of the federal and state governments and keep the federation on

¹⁹⁸ Tushnet (n 9).

balance. The HoF as a political institution remained a pawn and under the influence of those who wield power at the center. The HoF's pro center position on key federalism related issues and its failure to set limit on power and enforce human rights can only be understood in this context. The cases related to concurrent power and the thorny issue of demarcating the mandates of the federal and state governments in relation to self-rule and citizenship rights demonstrate the difficulty of mandating a political organ to umpire the federation. The controversy over the extension of the terms of the government also shows its dismal failure to set limit on power.

Overall federalism in Ethiopia operates without effective institutional safeguard that umpires intergovernmental disputes. The HoF is a political institution exposed to political manipulation. Federalism is principally about bargain and division of power. It is a delicate institutional balance. If the subunits are too powerful, the federation may face the threat of secession or dissolution. If the central government is too strong, it may impose itself on the subunits, rendering federalism a fiction giving way to unitary system. Studies point institutions that umpire in federal and devolved systems -as central to designing federal political systems that are self-enforcing and stable. Sub unit effort to subvert over the bargain or federal government effort to encroach on the mandate and autonomy of states is checked through impartial institutions such as Supreme or Constitutional Courts. Ethiopia's case shows efforts to federalize or decentralize power without effective institutions for checking political power: federalism without constitutionalism that is open for centralization or subversion depending on which force dominates the political dynamics.

Ethiopia's experience with constitutional adjudication through a political institution predictably shows the HoF's reluctance to mediate constitutional disputes impartially. It has resulted in a centralized federation that lacks judicial review and human rights without a guardian leaving the system open for political manipulation by a dominant and centralizing party. It is a text book example of abusive constitutional review where by the interpreter serves as instrument of power, not as guardian of the constitution.

The existing confusion among judges, members of the CCI and the HoF needs to be clarified through amendment based on the concept of dialogue where the courts will be clearly mandated to interpret chapter three though final and authoritative decision is reserved to the HoF. This

is hoped to provide courts with ample opportunity to enforce constitutionally entrenched rights and freedoms. Alternatively, establishing an impartial constitutional court with a monopoly over constitutional adjudication could serve as guardian of the constitution. Such an institution manned by senior experts in the field can umpire federal regional state disputes related to competences ensuring both level that the constitutional pact cannot be violated unilaterally: a crucial principle for emerging federations where sub units continue to seek for such guarantee. The Court can shape the balance in accordance with the spirit of federalism. The human rights regime entrenched in the constitution can get life if enforced by a constitutional court. More importantly, centralized political power- a major threat to the development of institutions and the rule of law can be tamed through such a court. Federalism without rule of law leaves the former to be a victim of political manipulation making it a façade. An independent and distinct constitutional court along the German experience with an exclusive mandate over constitutional issues composed of experienced constitutional lawyers from different regional states can ensure balanced, impartial and peaceful resolution of disputes.



Conclusion

The book demonstrated the nation state, its normative assumptions and its challenges in particular in relation to managing politically mobilized cleavages. It also discussed how five federal and devolved systems in Africa have tried to manage the cleavages in their respective countries. While some mix is unavoidable, the choice is between integration (Nigeria, Kenya, South Africa) and Accommodation (Ethiopia, that largely remained a promise). Sudan has yet to decide whether to be federation or continue as integrated unitary state although there is serious push from the periphery for accommodation in the form of devolution or federalism. The different approaches show institutional design is not an abstract process. It is often a response to peculiar challenges. The nature and level of mobilization of cleavages is critical and there is a need to design institutions that meet the peculiar demands. The countries covered in this study are all inhabited by collection of minorities that brings its own distinct challenges as to how to establish legitimate institutions at the center and the design issues related to addressing their demands at sub unit level. This fact also complicates the process of polity building as most of the states covered in this book also suffer from weak state institutions that are hijacked by informal networks and neo-patrimonial systems albeit to varying degrees. As in Sudan, the weak or absence of functioning state institutions makes democratization and federalism daunting

task, if not mission impossible. In Ethiopia, although authoritarian it had the institutions but with increased polarization and political intervention, the institutions are falling into the hands of those who wield power at the center and losing their legitimacy. As a result of the ongoing war, state institutions are also collapsing complicating the federal process. The federal government has lost control over parts of Oromia, large part of Amhara and Tigray regions. Key institutions have been destroyed or looted and there is little that federalism or devolution can do in the absence of functioning state institutions. Federal and devolved systems in the west had already functioning state institutions before they were federalized. This is one of the major differences between advanced federations in the west and those that operate in Africa. One can think of federal and devolved systems in Somalia and South Sudan, two extreme examples where there is an effort to implement non centralized system and yet both countries lack functioning state institutions. State building has to be done along side federalization and devolution. We noted how inclusive political and economic system and delivery of public services (state building) are linked to polity building and in most African countries this is a dream yet to be fulfilled. Inequality and partial delivery of services combined with political and economic injustice coinciding with the fault lines simply make a perfect case for political storm and conflict. We also noted the role of public policy. It can facilitate or serve as an obstacle to polity building. Public policy is the result of political framework. If it is designed along the centralization framework and in a context of divided societies, it becomes a tool for polity destroying. If designed in a more accommodative framework, it can assist in polity building.

Political integration in the form of federalism, power sharing and devolution remain the principal instruments of polity building. There is thus strong link between these institutional approaches and polity building. What type of federalism or devolution however is linked with the nature of the cleavages and their level of political mobilization. Softer cleavages, presence of middle class and ANC's vision has made South Africa chose the integrationist path although its electoral system combines accommodation features. By comparing the federal and devolved systems in Africa and drawing lessons from the rich comparative literature it is argued that the nature of the cleavage and its level of mobilization matter and has effect on institutional design. Countries with more mobilized and territorially based cleavages like Ethiopia have, at least formally, chosen some form of accommodation albeit without including the consociational

elements. Yet, at the end of the day, political reality would dictate constitutional designers to be flexible and combine a mix of accommodation and integration and rightly so. As in Ethiopia nesting identity through strong protection of individual and minority rights, right public policy tools for accommodation remain vital to ensure social cohesion, unity and common citizenship. These issues have never been addressed and continue to be Ethiopia's major challenge. The issues related to intra unit minorities show the depth of the problem in Ethiopia. In Nigeria and Kenya, there is growing concern that the cleavages may deepen further unless accommodation policy is employed to provide political and identity space for sub state nationalism and minimize political mobilization based on identity. Integration has not been able to respond to strongly mobilized groups in Nigeria and Kenya and failed integration policy can slowly fuel ethno nationalism resulting in more radical demands. In South Africa, despite an integrationist design, the proportional electoral and parliamentary systems have promoted political inclusion that alongside the other factors (middle class and black majority) have moderated cleavages. Economic inequality that was side lined during the transition remains South Africa's major challenge.

As a result of coercive nation building process that liquidated quasi autonomous kingdoms and failure by successive regimes to respond to demand for accommodation, the number of national liberation fronts in Ethiopia is a record within the African continent. The left-outs from the nation building process have continued to challenge the center. The debate between the centrist elite and the left-outs is Ethiopia's major political paradox that makes the country very fragile. To its credit PP has conceded to long overdue demands for self-government in the South resulting in four new states. Yet except the Sidama, the 'clustering system' is not only top-down but replicated EPRDF era policy in the South and thus continue to face challenges in Wolyta and Guraghe among others. We noted already how an otherwise generous power that ensures self-government was curtailed by democratic centralism, hegemonic party and centralized policy making under EPRDF and extreme centralization, martial law, deinstitutionalization and violence under PP. In comparison with the other federations under discussion, two points further complicate Ethiopia's political context. The extreme centralization of power at the center and the brute use of force to deal with political issues was an incubator to the ethno national based liberation fronts that emerged in

the early 1970s. In addition, the failure to dialogue and make compromise to resolve political issues characterizes modern Ethiopian politics. It is hard to find something comparable to the political settlement in post-apartheid South Africa or Kenya's post 2007 political deal following the election crisis or the current building bridges initiative (BBI). Entrenched, territorially based and politically mobilized cleavage is the outcome. The distinct and radical nature of the post 1991 Ethiopia's federal system in its determination to address the nationality question albeit with limited implementation was an effort to address this issue. Adding fuel to fire, the new regime now in power has chosen an increasingly authoritarian, centralized and personal rule. The official narrative and the policies coming from it are antagonizing ethno national groups and serving as an incentive to respond in more radical forms. The Tigray and Oromia crises are living examples but the outstanding issues are there in other regional states as well. Besides one party control over federal and regional state institutions is increasingly causing frustration within the political elite outside the ruling party. In Nigeria and Kenya, losers at federal level are more or less compensated as they have been able to win majority seats in the states. In both countries there is some progress in the democratization process while in Ethiopia alienation at both levels is reinforcing sense of isolation and separation and the stakes are high at the center more than any time before.

Coming back to the link between the nature of the cleavage, level of mobilization and impact on institutional design, two institutions emerge as relevant. Where the cleavage and its mobilization is high power sharing and consociational federation that ensures self-government and fair representation at central level fit well in containing it. The central government in each of the countries under discussion continue to be perceived very thin in terms of legitimacy and lack of inclusion albeit to varying degrees. *Ethnocracy*, that is sense of state capture by a particular elite that is not inclusive enough is high in Ethiopia, Sudan, Nigeria and to some extent in South Africa and Kenya. Besides each country is composed of collection of ethno national minorities, none of them taken alone commanding a majority. Even if each of these countries were to be democratic (many of them are not), majoritarian based democracy in deeply divided societies become source of problem than a solution and thus the need for other inclusive options. It becomes a clash between a minority that has state resources at its disposal trying to impose its will on another minority. Yet even if the central government's project of nationalism enjoys a majority,

it pits a permanent majority against a permanent minority and the latter has no hope of becoming a majority. With it comes the issue of why would an ethno national minority under perpetual rule of injustice be expected to be loyal to such regime and stay in the union. The general assumption of majoritarian democracy that the rulers alternate during election in that today's majority will become tomorrow's minority does not hold true in deeply divided societies. In this context the institutions as well suffer from legitimacy crisis. The decisions of the majority are not accepted by the minority. The values of the centrist state such as the flag, the national anthem, public policy, the media, language and cultural policies that are instruments of centralised nation building are deeply resented and rejected by the ethno national minority. Thus alternative theories such as consociational democracy are recommended when the political system faces deeply divided cleavages. Instead of having winners and losers, consociation democracy brings major political actors either on equal or through proportional arrangements to power and insists on consensus decision making on fundamental issues. Thus left out in the majoritarian democracy become decision makers through power sharing, reducing the potential for conflict. Surely, power sharing arrangements are not risk free. They may at times result in government of crisis yet the choice for countries such as Ethiopia is between fragmentation and never ending tension and war or possibly durable, more inclusive and slow but consensus based decision making process. If securing durable peace and inclusion are main objectives, the benefits could outweigh its limitations.

Distinct institutional arrangements thus matter in managing cleavages and reducing conflicts.

The point is federal and devolved systems that aim to accommodate deep cleavages should not only be democratic but have to be consociational democracy. There is strong link between federalism and democracy. Federations assume continued engagement of citizens and states in the decision making process, it is a voluntary consent. Non centralization and multiple centers of power are also its features. The *foedus* along with intergovernmental relations also imply an open political bargaining and avoidance of violence. Seen from this framework, Ethiopia's trouble remains very clear. While Ethiopians and the international community hoped for Ethiopia's transition to democracy under Abiy, we noted that the transition is not only stalled but the process is also hijacked by a centralizing and increasingly authoritarian elite that has marginalized key political actors. Centralization and marginalization are currently two

major challenges. Both are *inimical* to deeply divided Ethiopia that hosts variety of territorially based cleavages. Cycles of marginalization have entrenched fragility in Ethiopia, as the fight continues between those that are in power and those that are excluded. Transition to democracy can only succeed through an inclusive dialogue that produces political settlement addressing the deep cleavages.

The second distinct institutional feature that deeply divided societies with territorial cleavages need is political autonomy and representation. Unlike the integrationist presidential federations that disperse power into many centers, ethno national parliamentary federations aim to empower such groups by redrawing territories to ensure that they become a majority at sub state level so that it will exercise meaningful political autonomy and self-government while at the same time ensuring representation in the national political process. Ethno national minorities challenge the coercive process of state formation and the subordinate relationship they have with the center. They assert a national identity whose goal is to ensure self-government within a defined territory and thus the relationship between groups and territory becomes critical. While in integration cleavages are deliberately subdivided into several sub units, in accommodation the cleavages think such an approach is a ploy to divide and rule and insist on having a constituent unit that ensures them to have a majority and territorial control where they exercise territorial and political autonomy and decide their own affairs. Compared to presidential centripetal federations, consociational parliamentary federations bring the major political actors to the executive and parliament and minimize the risks of winner takes all associated with presidential systems. As it often leads to coalition government, the system needs consensus based process of decision making to avoid government collapse and that is an incentive for elite bargain. So far we noted the principle of representation has not been implemented by the federal government. In most cases, representatives are handpicked by the center, not by sub units and thus remain instruments of center and not genuine representatives of sub units. We have seen how *puppetism* impacted the legitimacy of institutions in the last three decades and it seems the new regime is pushing it to the extreme. Mobilized ethno national group that feels less represented in federal institutions has little incentive to stay in the union unless it is assured of some level of influence or even a veto at the center. To minimize the growing mistrust between the federal government and regional states and build trust, indeed key decisions that affect the country and

the regional states need to be decided by a *consensus* between federal government and regional state leaders. In the case of Ethiopia, the level of mistrust between the center and the sub units has reached a new level and self-government and fair representation alone do not seem to be enough to address the current stalemate. A confederate system in which the sub units enjoy more power and resource autonomy than is currently stipulated in the constitution and *equal representation* of sub units in central institutions could possibly serve as tension diffusing mechanism. The role of the center needs to be limited to mere symbolic roles while transferring key political and fiscal issues to the states. This approach will lower the stakes at the center as sub units exercise more autonomy.

In Kenya, Nigeria and South Africa the choice had been diffusing cleavages. While Kenya's provinces more or less coincide with the major ethnic groups, the new constitution does not grant any powers to provinces. The devolution is based on the county level. Similar to the logic of Nigerian and South African integration federation, larger ethnic groups in Kenya do not have ethnic homelands at county level. The county boundary divides the larger ethnic groups into several counties. It does not take the ethnic/religious based provinces as building blocks during political engagement but rather breaks them into smaller units. Furthermore, while the constitution outlines broader objectives of devolution (Article 174) that includes limiting imperial presidency, ensuring development and ethnic harmony and reducing conflicts, the overall design of devolution shows major focus on development and service delivery and less on ethnic accommodation. In the three federations, the overall logic is thus it is easier for the national government that controls power to manage many smaller size states than small number of bigger size provincial based strong ethnic groups. The biggest limitation of the integration approach is that it skips the central political demand by politically mobilized cleavages: political autonomy and self-government as its focus is on devolution for limiting imperial center, ensuring local development and service delivery. While South Africa seems fairly on balance, Nigeria and Kenya continue to face challenges of ethno national and regional based mobilization and that shows the limitations of integration.

Another major observation is that unlike Ethiopia, Kenya and South Africa do not have well organized ethno national based liberation fronts and thus the territorial integrity and unity of the state has never been put to test. The Zulu of South Africa or Maasai, Coastal people and the North East of Kenya are exceptions and not comparable to the TPLF, OLF and

ONLF of Ethiopia, not to mention Eritrea. The nature of the ethno national cleavage in Ethiopia is highly mobilized and indeed by 1991, this force has brought major state restructuring since then. Ethiopia in the eyes of the ethno national based liberation front is result of a coercive nation building process which if it does not allow major political space at regional state level and fair share at federal level could result in many new nation states. Even at a formal level, while South Africa and Kenya are not comfortable to call themselves federal hence employ a more neutral name devolution, in Ethiopia, ethno national liberation fronts think federation is not enough. They seek more transfer of political and fiscal power to the regional states along the lines of confederation. National liberation front's as well take pride in naming their regional states along the major ethno national groups as an indication of entitlement to constitutionally protected self-rule. One cannot say the same in Nigeria, South Africa and Kenya where the major focus has been 'recognition of diversity without empowerment.' The Nigerian, South African and Kenyan constitutions focus on national integration and unity and there in underlying fear that differences need not be institutionalized or entrenched through federalism or devolution. Federalism or devolution should rather aim to diffuse it. In other words, it is federalism and devolution for development, service delivery and ending 'imperial presidency' by dispersing political power in many centers. Kenya's 2010 constitution with its 47 counties each with directly elected governor and senators primarily aim at transforming the country's politics by reducing the high politics in the office of the presidency. The presidency, the resources that it commands along with the winner takes all made it so divisive as witnessed in the 2007 and 2017 elections. It was less violent in 2013 elections as the opposition at national level has won majority in no less than half of the counties and governorate positions and thus become a majority at country level. Thus accommodation and empowerment of ethno national minorities is not the primary objective of the system, diffusing power is.

South Africa and Kenya partly share some features of integration and to some extent explains the constitutional design options adopted in their respective constitutions. Both countries are characterized by politically salient cleavages that are both territorial and non-territorial and the issue of territorial accommodation is part of a larger constitutional agenda that may be offset by other claims. In South Africa, the white minority is territorially dispersed while the different linguistic groups though to some extent found geographically concentrated have rather been mobilized as

united entities by the ANC against colonizers. Despite linguistic differences, the idea of black majority is still alive. The groups are also internally less cohesive. Zulu nationalism has over the years lost to ANC even in its home province. Integration seems to have worked fairly well.

In Kenya, ethnicity is more visible compared to South Africa but has not transformed itself into a national liberation front the way it is in Ethiopia. The political elite has yet to ensure ethnic and regional equality but does to some extent exhibit modest elite bargain when the political temperature rises. The power sharing arrangement between the two major protagonists following the election crisis in 2007, and the magic handshake between Kenyatta and Odinga following the election crisis in 2017 are recent examples. Yet this has remained ad hoc and unless it is institutionalized could transform and harden identity based politics. As witnessed in the successive elections, presidential elections are fought along ethnic lines based on ethnic coalitions than on ideological basis and at times lead to deadly conflicts and thus devolution has not diffused ethnic conflicts. Identity based mobilization has not wither away. The Building Bridges initiative (BBI) is an indication of painful process that aims to respond to that mobilization through executive power sharing. The BBI, was meant to re-establish the office of the prime minister reducing the powers of the president though quashed by the Supreme Court.

In Nigeria and Kenya in particular, integration has increasingly been questioned and softer form of mobilization has frequently called for accommodation and more transfer of power to sub units. The current Nigerian federation is in many ways the making of the military rulers who envisioned a very centralized federal system and many small size constituent units that frustrated the demands of bigger ethno national groups ambition for self-government. Failed integration can deepen cleavages and shift the gear towards accommodation. True federalism by the Yoruba, confederation by the Igbos, high sense of marginalization and demand for resource control from the oil producing Niger Delta (home of the Ijaw) appear frequently in constitutional reform debates. Thus cries for reform in the Nigerian federation leading to rotating presidency among the six bigger geo-ethnic regions, demand for 'true federalism,' more power and resource devolution to states have been on the agenda since the return to civilian rule in 1999 although little progress has been made. Certainly these are some of the major forces in Nigeria pushing towards federal accommodation and it is thus obvious that integration

resulting in weak states and strong federal government has not done well to contain cleavages. Thus Nigeria is in unending search for genuine federalism with some powers transferred to states.

As it has already been demonstrated in the relevant chapters, focusing on institutional design alone however is misleading particularly in the context of federal and devolved systems in Africa. Federal and devolved systems in Africa are often *betrayed* for one reason or another. Firstly, despite constitutional promises, centralization remains an obstacle to the realization of the potentials of federalism and devolution. The federal and devolved systems manifest centralizing features. In the case of Nigeria, Kenya and South Africa, centralization is the result of *both design and practise*. Federal government enjoys long list of exclusive powers, shares concurrent mandate with the states and is backed by the principle that in case of conflict between federal and state law, the former prevails. Federal government often tends to exhaust the concurrent field leaving little room to the states. The respective constitutions also provide wide discretion for federal intervention in the affairs of states. In the case of Kenya and Nigeria, small size and large number of states are also no matches to the imperial center. The provinces in South Africa are sandwiched between the national and local governments as the ANC had little interest to empower the provinces. In the case of Ethiopia, despite generous grant of powers to the states, hegemonic party, centralizing ideology, military and personal rule have made self-rule hollow. Over all self-rule in African federal and devolved systems remains more promise than reality and cleavages continue to push for a political space at sub unit level and accommodation at federal level, albeit to varying degrees.

Secondly, *ethnocracy* (public institutions hijacked by a political elite that represents only a portion of society) and lack of inclusive political system remain key governance challenges throughout Africa including in the five case studies. Despite the adoption of federal and devolved systems since early 1990s, cry for inclusion and transfer of power and resources to sub units remain high in the agenda. In Kenya it comes in the form of addressing 'skewed development,' in Nigeria cry for 'true federalism,' in South Africa 'Zullification' of public institutions' during former president Jacob Zuma's tenure and in Ethiopia 'end national oppression and ensure genuine federalism' continue to be key demands. Tension between the center and the periphery has resulted in decades of civil war in Sudan resulting in secession of South Sudan and the on-going tragic war. Thus declaring federalism or devolution is not enough, lived reality matters

most. In the end what matters is whether there is political elite that is determined to *implement* what has been promised in the constitution and whether there is as well enough stake holders and institutions that keep an eye on it. Are there independent and autonomous institutions that enforce the pact when violated by political actors? The will to implement the pact, strong institutions (either in the form of Supreme Court or Constitutional Court) that enforce the constitution and the rule of law remain critical. While Kenya and South Africa have shown some progress in this regard, these federal supportive mechanisms are almost absent in Ethiopia and do not exist in Sudan. Federalism and devolution are rule based and there is little that federalism and devolution could do in the absence of constitutionalism and the rule of law.

While the use of federalism and devolution as a means to manage diversity and reduce conflict has been on the rise since the end of the Cold War, the record within Africa remains contested. In the first place, the federal and devolved systems have been introduced as a last resort following protracted conflicts. Secondly despite promises for federalism and devolution, they remained highly centralised with the federal government retaining key powers and resources, and the design often superficially and reluctantly implemented. To state whether the federal or devolved system works, they must first be implemented. Implementation depends again on a broader embrace of constitutionalism; commitment to the federal principle and respect for autonomy of the sub units, separation of powers, and the rule of law. Experts have emphasized for a federation to be a successful it must be honest to its proclaimed nature. That is to say, it should be a federation in form as well as in operational reality. This is one of the core challenges for many federal and devolved systems in Africa. Nigeria's federalism remained under military rule until 1999 and thus was considered by experts as sham. There has been some progress since the return of civilian rule in 1999 but is far from the ideal. The federal system in Ethiopia remained a victim of hegemonic and dominant party rule that focused more on economic transformation than genuine self-rule. Latest developments also hint centralization is in full swing and regime resorts to violence than bargain and negotiation to deal political issues. Some experts thus talk about 'federations without federalism in Africa' referring to the mismatch between promise and reality. Others have emphasized the importance of democratic pluralism and the existence of decentralized party system. Federalism cannot exist without democratic pluralism which permits groups really to be autonomous. It is sometimes argued

that an authoritarian one party system which by definition concentrates all political power in the hands of one group at one central point, is incompatible with the federal concept of divided power. The Nigerian federal system operated for a long time under strong military influence. Still others emphasized the fact that not only should the beginning of the federal process be voluntary but also that the process thereafter should have an inbuilt spirit of sense of partnership and bargaining between the different actors in a federation.

In most African federations, the will to keep the federation going-federal spirit, the *foedus* is missing. Instead of adapting the federation to new developments through interpretation, negotiation or amendment, the regimes resort to unilateral action or federal withdrawal resulting in conflict, civil war or secession. Resort to bargain and negotiation than violence and use of force, is integral element of federalism. There is no federalism without *foedus*. It refers to the commitment to implement federalism as outlined in the pact by both levels of governments. Resort to force or unilateral action goes against the federal will. The Ethio-Eritrea federation (1952–1962) was unilaterally dissolved by the emperor and the result was civil war and Eritrea's secession in 1993. The Addis Ababa Agreement that ensured autonomy to South Sudan and that brought relative peace to the Sudan was unilaterally abrogated by the regime in Khartoum resulting in devastating civil war and secession of South Sudan in 2011. Withdrawal of federal promises unilaterally has thus consequences. Federal systems establish an impartial institution in the form of Supreme Court or Constitutional Court that resolves disputes between the two levels of governments. Such institutions ensure that one level does not change the pact unilaterally. They serve as guardians of the federal constitution by enforcing the supremacy clause. They give life to the constitution and federalism and the absence of which may result in constitutions without constitutionalism and a federation without federalism. Thus it is hardly possible to find a functioning and healthy federalism without a constitutional court or Supreme Court. Kenya and South Africa have shown progress in this respect with Nigeria slowly catching up. This is major concern in Ethiopia that has chosen a political organ, the HoF, to serve as a guardian and as noted already, the HoF is serving as instrument of power to those who control the federal government. Federalism is rule based system that defines the respective powers of the different branches and levels of governments. The umpire makes sure that those powers as defined in the constitution are respected

and when violation occurs the violator faces consequences. There is thus strong link between federalism and constitutionalism. Federalism without constitutionalism becomes a victim of power and personal rule. Ethiopia is a living example of this reality. The federal system lacking institutional safeguard remained a victim of democratic centralism, developmental state and now of militarism and anarchy.

We often assume and take the role of the state and its institutions in Africa for granted. The bare minimum role of any state be it federal or unitary, democratic or authoritarian is ensuring the safety of its citizens and law and order. However, in most parts of Africa, including Ethiopia the state and its institutions continue to be source of insecurity. The political elite in power deploys the state institutions to commit political killings, massive human rights violations, and as seen in the case of Tigray deliberately starve the whole region cutting all essential services (banking, electricity, medical supplies) and by allying with the most repressive Eritrean regime to commit ethnic cleansing and genocide. State institutions were deployed to annex territory and loot an entire regional state. The social fabric that holds the region with Ethiopia has deliberately been destroyed. From religious leaders to public figures, business men, self-styled elders and the media have all stood alongside the brutal regime in power. No surprise those aggrieved have joined the resistance in masses from former army generals to artists to ordinary men and women. How do regional states prevent themselves from such repressive apparatus? Trust between the federal government and region is damaged and it is not clear if it can be repaired. One narrow possibility is to resort to a confederation in which substantial political and fiscal power is devolved to regional states by limiting the role of the center to merely playing symbolic roles. This should be followed by consensus based decision making at the center on matters that are left with the union government. Perhaps this can assist in healing wounds and try if the union is worth maintaining.

All in all, however, the federal and devolved systems discussed in this book manifest centralizing features and this is one of the distinct feature compared to advanced federations in the west. This is a puzzle though. Differences in the nature of cleavages and level of political mobilization are expected to result in different institutional designs following the logic of divided societies and their impact on institutions. Yet the findings show, despite minor differences, the outcome is centralized federalism and devolution. The primary explanation as elaborated well in

chapter one emanates from the nature of state power in Africa. Political power is not yet regulated and impacts federalism and devolution in many ways than one. Whatever institutional designs are put in place, big men, army, business elite, clan, hegemonic and dominant parties are the actual machines that operate the designs. The nature of power in Africa- an imperial center (regardless of whether the design in the constitution is presidential or parliamentary, integration or accommodation) and the patron-client relations between the center and sub units; stability imperative- the claim by the federal government to contain centrifugal forces also explain the unitary features of African federal and devolved systems. Within this overall observation however we find some distinctive nuances. In the case of Nigeria, Kenya and South Africa, centralization is the result of both design and practise. One should note as well by design Kenya and South Africa, the focus is more or less local decentralization than sub unit based federalism. The provinces in Kenya have no constitutional mandate and the provinces in South Africa are sandwiched between powerful center and assertive local government as the ANC had little interest to empower the provinces. Yet in all three federations, federal government enjoys long list of exclusive powers, shares concurrent mandate with the states and is backed by the principle that in case of conflict between federal and state law, the former prevails.¹ Federal government often tends to exhaust the concurrent field leaving little room to the states. The respective constitutions also provide wide discretion for federal intervention in the affairs of states.

Besides, in the case of Kenya and Nigeria, small size and large number of states are no matches to the imperial center. In the case of Ethiopia, despite generous grant of powers to the states with a focus on self-government and secession, hegemonic and single national party, centralizing ideology, frequent use of emergency, command posts and personal rule have made self-rule hollow. Within these broad observation however, political pluralism and the progress towards democratization in Kenya and Nigeria has opened an opportunity for sub state governors to assert and exercise some level of autonomy as opposition parties have been able to win seats in several states. While in South Africa and Ethiopia the hegemonic parties have command and control over sub units. Yet the

¹ See for example Article 192(2) of the Kenyan Constitution.

ANC is losing dominance in the bigger cities and that has opened political space for opposition coalition to assume power. Ethiopia is an extreme case of central political control and complete disregard of the constitution with little or no progress towards democratization. This context explains the political explosion it continues to face. Donald Horowitz argues the opening up of local political space (as in the three countries) averts the likely hood of ethnic separatism: losers at federal level can still enjoy self-government at sub unit level. Politics is not any more zero-sum game and this reduces the high stakes of power at the center. Marginalization at federal level and denial of self-government at sub unit levels reinforces alienation and separation.² This is what is happening in Ethiopia. It is zero-sum game and the stakes are high and risky at the center. Despite these important nuances, assessed from the ideals of federalism, self-rule in African federal and devolved systems remain promises betrayed and cleavages continue to push for a political space at sub unit level and accommodation at federal level, albeit to varying degrees.

Final note on Ethiopia: given the current level of crisis, it is not clear whether the political elite will resort at some stage to conduct an incremental reform, will be pushed to enter an entirely new social contract or insist in violence facilitating state fragmentation. All are possible scenarios. The tension between those pushing for more integrated Ethiopia and the ethno national based forces is not necessarily incompatible. From the centrist elite's perspective, greedy political ambitions and extremism aside, maintaining the unity of the country, social cohesion and country wide protection of citizenship rights remain a top priority. This is understandable. The Amhara elite accompanied by the Guraghe and a section of the Oromo were key players starting from Menleik's project of nation building all the way to the last century. Liberal clauses of the constitution and enforcement of such basic rights and freedoms using independent judiciary along with a constitutional court that serves as a guardian of the constitution can address such concerns. Empowering the HoF to engage in law and policy making also builds regional state role in the center and there is wide emerging consensus on this as well. There is little contest on these matters. Ethno-national forces crave for genuine self-government free from interference of the federal government (be it party channel or otherwise) and inclusion at the federal level. They suspect whoever

² Donald Horowitz, *A Democratic South Africa? Constitutional Engineering in a Divided Society* (Berkeley: University of California Press, 1991): 221–223.

controls the center often tends to centralize power and resources. Equal or proportional representation of regional states in federal institutions, consensus based decision making on key political and economic issues, and genuine autonomy to regional states will go a long way in addressing such concerns. The Amhara elite was against these proposals but given the current war between the center and the regional state, they seem to be resorting to these options as well. The interests of both camps are thus not necessarily incompatible and can be subject to negotiation. The revision of the constitution could thus be made once a dialogue addresses the outstanding issues. Political agreements are formalized through a constitutional pact where all actors agree to abide by. Free and fair elections will then follow as a means to hand over power to an elected government. The main obstacle remains the lack of political will particularly by those who hold power at the center and regime's extreme use of violence that has made dialogue and use of federalism meaningless. If political settlement is not made as early as possible, radical ethno national and regional forces could also possibly win and construct a loose confederal arrangement. Some think the costs of maintaining unity and territorial integrity of the country has become so high at times resulting in ethnic cleansing and genocide. They question whether maintaining such unity is worth the price as the center continues to be the main source of insecurity and massive violation of human rights. They think the stakes at the center are too high and need to be diffused. They insist on significant transfer of power and resources to the states along confederal lines, with the center retaining only symbolic unity.

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